H. B. Zachry Company *and* International Brotherhood of Electrical Workers, Local Union 480. Case 26–CA–16466

October 31, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

On November 14, 1995, Administrative Law Judge Lawrence W. Cullen issued the attached decision in this proceeding. The Respondent filed exceptions and a supporting brief and a motion to supplement brief in support of exceptions.[1] The General Counsel filed an answering brief.

On August 16, 1996, the Board issued an order remanding the proceeding to the judge for further consideration of his findings that the Respondent had violated Section 8(a)(3) and (1) of the Act by its failure to hire union supporters Thomas Butler, Gary Greer, James Hill, Mike Mapp, William Reynolds, and paid union organizer Sammy Yelverton, and by laying off employees Joe Holloway, Robert Bolin, and other crew members. The Board ordered the judge to prepare a supplemental decision containing specific credibility resolutions and findings of fact with respect to these issues and new conclusions of law and recommendations in light of his additional findings of fact, including a recommended Order.

On November 12, 1997, the judge issued the attached supplemental decision in which he reaffirmed his earlier unfair labor practice findings. The Respondent filed exceptions to his supplemental decision and a supporting brief, and the General Counsel filed an answering brief to these exceptions.

On May 11, 2000, the Board issued its decision in *FES (A Division of Thermo Power)*, 331 NLRB No. 20, that set forth the framework for analyzing refusal-to-hire allegations such as those involved in this case.[2] Thereafter, on June 14, 2000, the Board invited the parties to file supplemental briefs so that they could address "the *FES* framework as it applies to the record in this case." The General Counsel and the Respondent subsequently filed supplemental briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions as modified and to adopt the recommended Order, as modified below.

In this proceeding, the judge found that the Respondent had violated Section 8(a)(1) of the Act by various statements made by certain of its supervisors. As noted above, he also found that the Respondent had violated Section 8(a)(3) and (1) of the Act by its refusal to hire certain employees and by its layoff of other employees. We affirm these violations with the exception of the allegations pertaining to the Respondent's refusal-to-hire job applicants Thomas Butler, William Reynolds, and Sammy Yelverton. Based on our recent decision in *FES*, we address at further length the refusal-to-hire allegations involving Gary Greer, James Hill, and Mike Mapp, as well as the allegation that the Respondent's layoffs were discriminatory. We shall remand to the judge issues relating to the Respondent's alleged discriminatory failure to hire Butler, Reynolds, and Yelverton for the reasons stated below.

[1] We grant the Respondent's motion to supplement the brief that supported its exceptions to the judge's original decision in order to correct the judge's findings regarding its case history before the Board. Based on our review of the Respondent's submission, we delete the judge's citation in sec. II,B, first paragraph of his original decision to *H. B. Zachry*, 266 NLRB 1127 (1983), as establishing evidence of the Respondent's prior unfair labor practices because the Board dismissed the complaint in that case.

[2] Although *FES* also set forth the proper analysis for refusal to consider for hire allegations, the General Counsel has not alleged this violation in the present case.

[3] The Respondent has excepted to some of the judge's credibility resolutions. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent argues for the first time in its brief supporting its exceptions to the judge's supplemental decision that the judge erred in his initial decision in discrediting the denial by its electrical superintendent, Mickey Cain, of statements violating Sec. 8(a)(1) of the Act attributed to him by employees Tommy Dearing and Randy Wallace. Assuming that the Respondent was attempting to raise an exception to the judge's finding of these violations, we conclude that the Respondent was precluded from raising this argument at this stage of the proceeding as the Respondent did not except to this finding in its exceptions to the judge's original decision and the Board's remand to the judge for a supplemental decision did not encompass the 8(a)(1) violations he found. Cf. *EDP Medical Computer Systems*, 302 NLRB 54, 55 (1991) (the employer could not raise an affirmative defense to the Board in a backpay proceeding since it had not specified that defense in its answer to the compliance specification and had not sought to amend its answer or raise the defense during the backpay hearing). Further, even if the exception was timely raised, we adopt the judge's crediting of Dearing's and Wallace's testimony regarding the statements that Cain made, and his findings that these statements interfered with the employees' right to exercise their Sec. 7 rights in violation of Sec. 8(a)(1).

The Respondent's Alleged Refusal to Hire the Alleged Discriminatees

In *FES*, supra, the Board held that a prima facie case of an employer's discriminatory refusal to hire consists of the following elements:

> (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants. [Footnotes omitted.]

[Slip op. at 4.] Once the General Counsel has established these elements, the burden shifts to the employer under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), to show that it would not have hired the applicants even in the absence of their union affiliation or activities. We now apply the *FES* criteria to the facts of this case.

A. The Respondent was Hiring Electricians when the Discriminatees Applied for Work

The evidence shows that the Respondent began performing electrical work for Vicksburg Chemical Company in Vicksburg, Mississippi, in March 1994.[4] Once Electrical Workers Local 480 (the Union) learned that the Respondent, a nonunion contractor, was performing work within its jurisdiction, the Union decided that it would allow members to seek employment with the Respondent as voluntary union organizers, also known as "salts."

On August 1, the Respondent's electrical superintendent, Mickey Cain, hired Randy Wallace as an electrician. Wallace, who did not reveal his union membership, began work on August 3.[5]

On August 12, union members James Hill, Mike Mapp, and William Reynolds applied for work with the Respondent while wearing union buttons. All three members wrote the words "union organizer" on their job applications.[6] That same day, the Respondent offered electrician positions to nonunion applicants Henry Wilkinson, Johnny Weir, and Chris Wallace and electrical helper positions to nonunion applicants William Crafts, Joseph Wilkinson, and Kenneth Miller.[7] Also on August 12, Randy Wallace, the covert salt, asked Cain and Floyd Livingston, the Respondent's general foreman on the Vicksburg job, about hiring a friend of his. Cain replied that he could not because the Respondent had received some applications that had "union organizer" written on them.

Thereafter, the Respondent hired union member Joe Holloway as an electrician on August 14.[8] Holloway did not wear any union insignia when he applied for work and did not indicate that he was a union member on his job application. The next day, August 15, new hires Chris Wallace, Weir, and Henry Wilkinson began work, as did Crafts, Joseph Wilkinson, and Miller.

On August 17, the Union's assistant business agent, Sammy Yelverton, brought, inter alia, union members Billy Brady, Thomas Butler, Gary Greer, and Donald Smith to the Vicksburg jobsite to apply for work. These applicants wore union buttons and all, except Smith, wrote "union organizer" on the job applications they submitted. Yelverton listed the Union as his present employer. That same day, the Respondent hired nonunion applicants Sam Lungrin and Pete Williford as electricians.[9] Also on August 17, the Respondent assigned Paula Haigler, a clerical employee with no experience as an electrician and the wife of Foreman Randy Haigler, to work as an electrical helper.[10]

The next day, August 18, covert salt Tommy Dearing went to the jobsite and requested a job application. The Respondent's secretary told him that job applications were not available that day. When Cain arrived later in the morning, he told Dearing, who had been waiting for Cain, that the Respondent was not offering any job applications because "the Union had been out there the day before and struck on [sic]" it. Cain said that the Respondent had implemented a hiring freeze because union members had submitted job applications. Despite the purported hiring freeze, Cain eventually gave a job application to Dearing, who completed the form and submit-

[4] All dates are in 1994, unless otherwise noted.

[5] Cain testified that 3 days at a minimum generally elapsed between the time that the Respondent hired employees and the date that their employment began because new hires had to take and pass a drug test.

[6] Although the Respondent now contends that it "could have refused to hire the alleged discriminatees because they violated the Respondent's 'extraneous information' policy," it specifically admits it "did not apply this policy" to the discriminatees and therefore we do not consider this argument further.

[7] Although Christopher Wallace's job application states that he applied for a job on September 15, the record reveals that he took a drug test on July 29 prior to serving 2 weeks in the National Guard. According to Cain, he told Wallace that he would hire him on his return if he had room for him. If Wallace served 2 weeks as stated by Cain, the earliest that Cain could have contacted Wallace was August 12.

[8] Holloway began work on August 17.

[9] Lungrin and Williford, a former Zachry employee, started work on August 20 and 22, respectively.

[10] Paula Haigler's job application dated August 15 indicated that she was applying for an office clerical position.

ted it. Two days later, Dearing brought another applicant, Robert Bolin, to the Respondent's jobsite. Although Bolin was a union adherent, he was not a member at the time and wore no union insignia when he applied for work. Also, Bolin's application gave no indication that he had any affiliation with the Union.

On September 12, the Respondent hired Mark Ashe, a nonunion applicant who had been referred by another employee. He started work on September 15. Another nonunion electrician and former Zachry employee, Todd Grantham, came from his home in DeRidder, Louisiana, to work at the Respondent's Vicksburg jobsite on September 19.[11]

On September 21, Cain twice phoned Bolin to offer him employment. When Cain first called about 1 p.m., Bolin's wife answered the phone and said that Bolin was not at home. Cain called again about 7 p.m. that night and spoke to Bolin, who accepted the job offer. During this conversation, Bolin asked whether the Respondent also intended to hire Dearing. Cain replied that Bolin should inform Dearing that he also had a job if he wanted one. Bolin and Dearing began working for the Respondent on September 26. The next day, September 27, nonunion electrician Doug Knight, who had applied for work on the same day as Dearing did, began work at the Vicksburg jobsite. On September 29, the Respondent hired two more nonunion electricians and former Zachry employees John McKenzie and Kendale Williamson.

Despite these hires in August and September, there is evidence that the Respondent could have used additional electricians.[12] Thus, by as late as September 25, Cain told Bolin that he expected to work Bolin 11 hours each day, 7 days per week, for between 6 and 8 weeks. Indeed, the shortage was so acute that Bolin, Dearing, and Holloway observed carpenters, laborers, and the Respondent's safety employee performing electrical work on the jobsite. Moreover, on September 26, Dearing heard electrical foreman Randy Haigler tell employees that "there better not be any union organizers out there or they would—they had ways of getting around it."

Based on this evidence, we agree with the judge that the Respondent was hiring throughout the period when the alleged discriminatees sought work at the Vicksburg jobsite. The Respondent hired 13 electricians either concurrent with or subsequent to the date that union members Hill, Mapp, and Reynolds applied for work on August 12. Nine of these new hires also followed the submission of job applications by alleged discriminatees Butler, Greer, and Yelverton on August 17. For these reasons, we conclude that the General Counsel has met the first prong of the *FES* requirements for establishing a prima facie case of refusal to hire.

B. The Applicants had Relevant Experience for the Electrician Positions they Sought

As background, the evidence shows that the Respondent required applicants to complete only original application forms, not copies, and to submit them in person. The Respondent generally kept the applications it received in chronological order. When Cain could not hire a sufficient number of electricians by contacting former employees and persons recommended by current supervisors and employees, he would search the application files and determine which applicants to contact based on his review of their job qualifications. Cain considered the applicants' list of jobs, their previous employers, and the work description they provided. Cain preferred applicants who had the most years of experience performing industrial electrical work, rather than commercial or residential work. We find that, regardless of what Respondent's hiring preferences may have been, in actual practice it hired applicants who had no history of prior employment with the Respondent, and whose applications indicated skills and experience that were average at best and a history of short-term employment. As set forth below, alleged discriminatees Greer, Hill, and Mapp had skills and experience at least as extensive as other applicants who were offered jobs by Respondent. We therefore find that the General Counsel has established that these discriminatees met the Employer's requirements for the position for which they applied—that of journeyman electrician.

Hill indicated on his application that he had training as an inside journeyman, that he could operate "all equipment," and that he would accept employment out of town. On the part of the application where the Respondent requested information regarding former employers, Hill listed two electrical contractors for which he worked as a journeyman from March to July 1994, and from July 1991 to November 1993, respectively. Based on this evidence, we find that Hill was qualified to work as an electrician. In so concluding, we note, as discussed below, that the Respondent could hardly argue to the contrary given its claims that it attempted to offer him employment and thus had implicitly concluded that Hill possessed the requisite experience to perform its electrical work.

Greer stated on his application that he was willing to work out of town and could operate a "fork lift—bucket truck—[and] trencher." Regarding his work experience,

[11] We note that Grantham's job application was dated the same day that he began work.

[12] We note that, by mid-September, electricians Ashe, Weir, and Henry Wilkinson, as well as helpers Crafts, Joseph Wilkinson, and Miller, no longer worked for the Respondent.

Greer listed five employers for which he worked from July 1988 until February 1994. We find that Greer's recent work history demonstrates that he had relevant experience to work as an electrician. It is also clear that the Respondent itself agreed with this conclusion as it claims that it tried to hire Greer, as set forth below.

Reynolds stated on his application that he could operate a "G Lull Fork Lift" and listed his three most recent employers for which he worked from September to December 1993, April to July 1993, and October 1991, to June 1992, respectively. The Respondent argues that Reynolds' application shows only 14 months of specific experience as an electrician.

Yelverton indicated on his application that he would accept work out of town and that he was capable of operating "all types" of equipment, including "electrical tools, wench trucks, [and] bucket trucks etc." Regarding his work history, Yelverton's application stated that he had worked as business manager and union organizer for the Union since April 1992; that he served as business manager for Electrical Workers Local 1329 from November 1989 until April 1992; that he worked for Capital Electric Co. in Leavenworth, Kansas, from September to November 1989; and that, since June 1966, he had worked for employers affiliated with the NECA (National Electrical Contractors Association) all over the United States, with "28 yrs experience in all facits [sic] of elect. construction cable splicing & cert[ified] welder." The record further shows, however, that Yelverton had not worked as an electrician for nearly 5 years before seeking work with the Respondent, and he did not specify the NECA employers for which he had worked before attaining office (except for the 3-month stint with Capital Electric).

Finally, we note that Mapp's and Butler's job applications were not introduced into evidence. Nonetheless, we conclude that Mapp met the Respondent's hiring requirements. As was the case with Hill, the Respondent itself attested to Mapp's qualifications by allegedly attempting to offer him employment.

Based on the above, we conclude that the General Counsel has met the second prong of the *FES* requirements for establishing a prima facie case of refusal to hire with respect to applicants Greer, Hill, and Mapp. In so concluding, we stress that the Respondent hired employees Knight and Williford, who had experience of only 14 and 20 months, respectively, working as electricians. We note in this case that the relevant experience of Greer, Hill, and Map was at least as extensive as Knight's and Williford's job experience. In rejecting the Respondent's defenses as to these individuals, we stress that the Respondent itself has implicitly conceded that these discriminatees possessed the necessary qualifications to work as electricians on its jobsite based on the Respondent's assertion that, after reviewing their applications, it separately contacted Greer, Hill, and Mapp in order to offer them employment.

The Respondent, however, has not argued that it made similar attempts to offer employment to Butler, Reynolds, and Yelverton. Thus, since the Respondent has not admitted the qualifications of these applicants, the General Counsel has the burden under *FES* to establish that they had the necessary training and/or experience to meet the announced or generally known requirements of the job openings. We cannot make this determination on the sketchy evidence as to their qualifications in the present record. Accordingly, we shall remand to the judge issues relating to the failure to hire of Butler, Reynolds,[13] and Yelverton. The judge may, if necessary, reopen the record to obtain evidence required to decide the case under the *FES* framework. In remanding this aspect of the proceeding, the Respondent, in rebuttal of any prima facie case the General Counsel may present, has the opportunity to establish under *FES* that "it would have made the same hiring decisions even in the absence of union activity."

C. Union Animus Contributed to the Decision not to Hire Alleged Discriminatees Greer, Hill, and Mapp

Mickey Cain was the Respondent's electrical superintendent on the Vicksburg jobsite and made all the hiring decisions involving electricians. The judge found, and we agree, that Cain violated Section 8(a)(1) by telling employee Wallace that the Respondent would not accept any more applications, because he had received some applications which had "union organizer" written on them. We also adopt the judge's finding that Cain further violated Section 8(a)(1) when he informed Dearing, who was applying for work, that the Respondent was not offering any job applications because "the Union had been out there the day before and struck on [sic]" it.

These statements made by the Respondent's hiring official clearly reveal the Respondent's animus towards employing any union members or adherents. Here, Cain told Wallace that the Respondent was stopping the hiring process because "union organizers" had applied for work. We stress that Cain did not know Wallace was a union member at the time he made this comment and that Cain's coercive remarks immediately followed the submission of employment applications by union members

[13] Although the Respondent initially claimed at the hearing that it had made a phone call to Reynolds in order to offer him a job and received no answer, the Respondent abandoned this position after Reynolds testified that he forwards all calls to his sister's home where someone is always present to answer the phone.

Hill, Mapp, and Reynolds. Cain effectively conveyed the same message to covert salt Dearing a few days later after the other three alleged discriminatees, including assistant business agent Yelverton, had applied for work. Thus, based on his own remarks, we find that Cain was blatantly trying to avoid hiring employees affiliated with the Union.

To reinforce our finding of animus here, we rely on the evidence that Dearing, a union member whom the Respondent unwittingly hired, overheard the Respondent's foreman, Haigler, telling an employee that "there better not be any union organizers out there or they would—they had ways of getting around it." Haigler's threat of unspecified reprisals clearly violated Section 8(a)(1) as the judge found. His comments delivered the message to employees that they should refrain from organizing activities or they would suffer adverse consequences for defying the Respondent.

Finally, we note the Board's earlier findings in *H. B. Zachry Co*., 319 NLRB 967 (1995), enfd. in part 127 F.3d 1300 (11th Cir. 1997), that the Respondent, inter alia, engaged in widespread 8(a)(1) violations and unlawfully discharged two employees. We find that case is relevant to this proceeding as the events there occurred within 2 years of the Respondent's conduct under consideration here.

For these reasons, we find that the General Counsel has established that the Respondent's intention in this case was to avoid hiring union activists by choosing a work force of nonunion electricians at the Vicksburg jobsite. Accordingly, we conclude that the General Counsel has met his burden of showing that the Respondent possessed animus against hiring the alleged discriminatees.

D. The Respondent's Defenses

Having concluded that the General Counsel met his burden under *FES*, we now consider whether the Respondent met its burden of establishing that it would have hired Greer, Hill, and Mapp even in the absence of union activity and affiliation.

The Respondent argues that it had a valid nondiscriminatory reason for not hiring Mapp, Hill, and Greer as its phone calls to each went unanswered. In this regard, Cain testified that he made a single phone call to Greer, Hill, and Mapp on September 21 with the intention of offering them each employment. Cain further stated that, pursuant to his usual practice of making only one phone call to each applicant, he moved on to the next applicant when no person answered the phone at the number the alleged discriminatees had provided on their job applications. In support of Cain's testimony, the Respondent introduced into evidence phone records showing that Cain had made long-distance telephone calls to Mapp, Hill, and Greer.[14]

The judge found, as the General Counsel had contended, that the Respondent's alleged phone calls to Greer, Hill, and Mapp were a "sham" in that Cain dialed the proper number and then hung up as soon as there was a connection to create a record of his phone call. In so concluding, the judge noted that any phone call making a connection would register as a 1-minute call because that is the smallest increment to register on telephone records. For the reasons stated below, we agree with the judge that Cain's phone calls to the alleged discriminatees were not legitimate attempts to offer them employment.

In finding that Cain did not make a bona fide effort to hire these three applicants, we rely particularly on Cain's own testimony that his practice was to leave a message on an answering machine if no person answered the phone at the applicant's number. The judge's crediting of Hill's testimony that Cain left no messages on his answering machine belies the Respondent's assertion that it attempted to hire Hill. Also, when the Respondent failed to contact him, Hill twice called the Respondent's office, on August 30 and September 19, to ask about the status of his job application. The Respondent failed to respond to his inquiries.[15] We also stress Greer's testimony that his telephone has both caller identification and call forwarding on it. The judge credited Greer's testimony that he never received any calls from the Respondent through his call forwarding which he regularly uses, or that he could trace to the Vicksburg jobsite on caller identification. Thus, we agree with the judge that Cain's phone calls do not establish that the Respondent had a nondiscriminatory hiring policy. This finding is bolstered by the evidence that the Respondent made a similar assertion, as described below, that Cain had called Reynolds, which its attorney disclaimed after Reynolds' testimony firmly established that the Respondent could not have called him without somebody answering the phone.

Further, although Cain claimed that his practice was to make only one phone call to each applicant, the record shows that he called Bolin a second time after failing to reach him on his initial call and that this additional step

[14] Contrary to the Respondent's contention that it made a call to each of these alleged discriminatees, our review of the Respondent's telephone records reveals that the Respondent only made 1-minute calls to Hill and Greer. Mapp's telephone number is not listed.

[15] Although Cain testified that he never returns phone calls from applicants seeking employment, the judge found that his answer was "contrived" to justify his failure to hire the alleged discriminatees. We conclude that, in any event, Cain's response was disingenuous given that the Respondent badly needed to hire journeymen electricians like the alleged discriminatees as there was a severe shortage of these craftsmen at its jobsite.

resulted in Bolin's hire. There is also evidence that the Respondent hired Dearing by means other than a phone call. On accepting the Respondent's job offer, Bolin asked Cain about Dearing's status, to which Cain responded that Bolin should inform Dearing that the Respondent also had a job for him. Thus, the Respondent hired both Bolin and Dearing despite its being unable to reach them on a single phone call.

The Respondent also contends that it attempted to hire union adherents Billy Brady, George Myrick, and Don Smith and that this shows that there was no discriminatory motivation in Cain's hiring practices. We find no merit to this assertion. Regarding Brady, the evidence shows that he had written the wrong phone number on the job application that he submitted to the Respondent and that Cain could not reach him at that number. Based on the judge's findings regarding the Respondent's phone calls with respect to Greer, Hill, and Mapp, however, we think it likely that Cain, in Brady's case too, intended only to make a brief connection and then hang up the phone to create a defense to any subsequent discrimination charge. Under the circumstances, we find that Cain's testimony regarding his efforts to contact Brady about employment does not bolster the Respondent's argument that it did not hire the alleged discriminatees for legitimate reasons.

The Respondent also asserts as a defense Cain's credited testimony that he called Smith about employment with the Respondent and left a message with Smith's mother. Although Smith noted on his application that he had been an IBEW apprentice for 4 years, he also indicated five nonunion companies as his most recent employers for whom he worked at nonunion rates. As noted above, Smith also did not write IBEW or union organizer at the top of his application. For these reasons, Smith's application is distinguishable from those that the alleged discriminatees submitted. Moreover, as the Board observed in *Fluor Daniel*,[16] there is a significant difference between past union affiliation and notice of present intent to organize. Based on the evidence showing that the Respondent has a practice of refusing to employ applicants who have affirmatively demonstrated that they would engage in organizing efforts upon their hire, we conclude that the Respondent's willingness to employ Smith, who has only attenuated union links, is insufficient to refute a finding of hostile motive in the hiring process. It may be that, because Smith had worked for these nonunion employers and did not indicate on his application that he was a union organizer, the Respondent was willing to take a chance on hiring him even though he had served a union apprenticeship and had arrived at the jobsite with other union adherents, including Butler, Greer, and Yelverton. The Respondent, as stated, had a serious need for qualified electricians. In any event, given that Smith did not indicate on his application that he would engage in union organizing upon his hire as the alleged discriminatees had done, we do not find that the Respondent's purported attempt to hire Smith refutes the General Counsel' prima facie case that the Respondent has engaged in unlawful conduct by refusing to hire the alleged discriminatees.

Finally, the Respondent asserts as a defense Cain's credited testimony that he called Myrick about employment with the Respondent and left a message with Myrick's wife. We reject the Respondent's argument that this evidence negates a finding of unlawful motivation in this proceeding. The Board has held that an employer's failure to discriminate against all applicants in a specific category is not decisive in cases involving refusal-to-hire allegations.[17] Furthermore, on consideration of all the evidence here, we are satisfied that Cain's call to Myrick was at most an isolated exception to the Respondent's general practice of not hiring union adherents.

For these reasons, we affirm the judge's finding that the Respondent did not attempt to contact Greer, Hill, and Mapp for the purpose of hiring them. In so concluding, we have rejected the Respondent's argument that its purported efforts to hire Brady and Smith support its position that there was no discriminatory motive in its failure to hire the alleged discriminatees. We have also found that the Respondent's phone call to Myrick does not warrant a different result as it was an isolated event. Therefore, we conclude that the Respondent has failed to establish that it would not have hired Greer, Hill, and Mapp even in the absence of their union activities.

Accordingly, we adopt the judge's findings that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire applicants Greer, Hill, and Mapp. As stated, we shall remand to the judge issues relating to the failure to hire of Butler, Reynolds, and Yelverton.

The Layoffs

The record discloses that, on October 6, Bolin, Dearing, and Holloway distributed union handbills for 10 to 15 minutes before work in the area where employees signed in and out. All three employees wore union insignia when they attended a safety meeting that morning

[16] 311 NLRB 498, 500 (1993), enfd. in part, remanded in part, 161 F.3d 953 (6th Cir. 1998).

[17] See *Norman King Electric*, 324 NLRB 1077, 1085 (1997), enfd. sub nom. *Kentucky General, Inc.,* 177 F.3d 430 (6th Cir. 1999), enfd. mem. 178 F.3d 1294 (6th Cir. 1999); and *KRI Constructors, Inc*., 290 NLRB 802, 812 (1988) (mere seeking out of known union member applicants does not belay animus).

at which the Respondent's general foreman, Floyd Livingston, and Foremen Haigler, Steve Nolte, and Bill Tidwell were present. The meeting lasted 10–15 minutes and the employees returned to work. At 2 p.m. that day, the Respondent laid off Bolin, Dearing, Holloway, and three other crew members.[18]

We adopt the judge's findings that these layoffs violated Section 8(a)(3) of the Act. In so concluding, we stress that the Respondent had knowledge of Bolin's, Dearing's, and Holloway's union activities through the presence of Livingston, as well as three lower-level foremen, whose supervisory status the Respondent does not dispute, at the safety meeting during which these employees wore union insignia. Although the judge properly imputed to Cain the knowledge of the union activities held by the three foremen,[19] we note that this is unnecessary in the context here where Livingston, a higher-level supervisor, had direct knowledge of the employees' demonstration of union support. Their subsequent layoffs occurred within hours of the union activities in which they handbilled at the Respondent's entrance and wore union insignia to the safety meeting. We also stress that the judge credited the testimony of Bolin, Dearing, and Holloway that "there was a substantial amount of work remaining to be done" at the time of the layoffs and that the "Respondent's management" had told them as much. Based on these factors and the evidence of the Respondent's animus towards the union activities described above, we conclude that the Respondent made these layoffs for discriminatory reasons. It seems clear that the Respondent's intention was to rid itself of the union activists and that it laid off the entire crew of six employees in a futile attempt to justify its action. Thus, particularly given the timing of the events here, we agree with the judge that Cain's explanation for the layoffs in which he claimed that Vicksburg Chemical Company, the contractor for the job, had mandated them was pretextual. We therefore conclude, as did the judge, that the Respondent has not met its *Wright Line* burden of establishing that it would have laid off these employees even in the absence of their union activities.

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for Conclusion of Law 4.

"4. Respondent violated Section 8(a)(1) and (3) of the Act by failing and refusing to hire union supporters Gary Greer, James Hill, and Mike Mapp because of their engagement in protected concerted activities under the Act."

2. Delete Conclusion of Law 5, and renumber the subsequent conclusions of law accordingly.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, H. B. Zachry Company, Inc., Vicksburg, Mississippi, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b).

"(b) Refusing to hire applicants for employment because of their support of the Union or engagement in union activities."

2. Substitute the following for paragraph 2(b) and reletter the subsequent paragraphs.

"(b) Within 14 days of this Order, offer employment to employees Gary Greer, James Hill, and Mike Mapp in jobs for which they applied or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges to which they would have been entitled if they had not been discriminated against."

"(c) Make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision."

3. Substitute the attached notice for that of the administrative law judge.

IT IS FURTHER ORDERED that this proceeding be remanded to Administrative Law Judge Lawrence W. Cullen for further consideration, including the reopening of the record if necessary, to determine under the *FES* framework whether Respondent unlawfully refused to hire applicants Butler, Reynolds, and Yelverton.

IT IS FURTHER ORDERED that the administrative law judge shall prepare a second supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended Order, as appropriate on remand. Copies of the second supplemental decision shall be served on all parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

MEMBER HURTGEN, concurring.

I agree with my colleagues' disposition of the issues they have decided and with their decision to remand for further findings as to the qualifications of alleged discriminatees Thomas Butler, William Reynolds, and Sammy Yelverton. I write separately to explain more fully why I have concluded that this partial remand is necessary.

[18] Dearing had previously told the Respondent that he was quitting that afternoon.

[19] See *Swanson Group*, 312 NLRB 184 fn. 2 (1993).

My colleagues have remanded the case with respect to the three named employees because the record is unclear as to whether the General Counsel has established the qualifications of those employees. That element is a part of the "refusal to hire" test of *FES (A Division of Thermo Power)*, 331 NLRB No. 20 (2000). I agree with this rationale for remand. However, in my view, there is another reason for remanding. The judge may have confused the concepts of "refusal to hire" and "refusal to consider."[1] Indeed, the judge may have "converted" the Respondent's *failure to consider* Butler, Reynolds, and Yelverton into proof of an unlawful *failure to hire them*, irrespective of the extent of their qualifications as compared to those of successful applicants. In this regard, although the General Counsel did not allege a "refusal to consider" violation (and although the judge's conclusions of law speak of a refusal to hire, not a refusal to consider), there are many indications in the judge's decision that he analyzed the case, at least in part, as involving a refusal to consider.

Thus, in his findings of fact, the judge found that: Mickey Cain, the Respondent's electrical superintendent, utilized various methods to exclude the salts from *consideration*; Cain eliminated Butler from *consideration*; Cain's alleged reason for refusing to *consider* Butler was incredible; Cain chose to bypass applicants Gary Greer, James Hill, and Mike Mapp from further *consideration*; Cain's testimony was contrived in order to justify his failure to *consider* the Union salts for hire; Cain did not contend that Yelverton, Butler, and Reynolds were unacceptable, but rather did not *consider* them for other reasons; the Respondent did not *consider* any of the overt salts for hire; and, the Respondent did not exclude applicant Donald Smith from *consideration* because of his union apprenticeship.

Similarly, in the analysis section of his decision, the judge found that: the Respondent refused to *consider* the overt Union salts for employment; the Respondent admitted that it excluded Yelverton from *consideration*; Cain's stated reason for disqualifying Butler from *consideration* was pretextual. There are also numerous references in the judge's decision to the Respondent's "disqualification" of Butler, Reynolds, and Yelverton (and of other applicants). These references also lend credence to the view that the judge analyzed the case as a refusal-to-consider case.

Even assuming arguendo that the judge intended to resolve a "refusal to hire" allegation, his analysis was insufficient. Under *FES*, the General Counsel's prima facie showing in a "refusal to hire" case need only include evidence that the applicants had "experience or training relevant to the announced or generally known requirements of the positions for hire." By contrast, the Respondent's rebuttal of a prima facie case is different. Respondent can show any basis on which "it would have made the same hiring decisions even in the absence of union activity."

In the instant case, Respondent may well have made that latter showing, and yet the judge did not adequately deal with it. For example, although the judge summarized the experience of Butler, Reynolds, and Yelverton, and the experience of the electricians the Respondent hired, he failed to compare the experience of the alleged discriminatees to that of the successful applicants, except to note that Reynolds had the same number of months of experience as did successful applicant Douglas Knight Jr. But the Respondent contends that it made the selections it did in large part based on the relevance of the particular type of electrical experience possessed by various applicants to the specific requirements of the Vicksburg project. The judge's analysis simply fails to settle the question whether the Respondent showed that, based on these qualitative considerations, it would have made the same decisions (as to Butler, Reynolds, and Yelverton) in the absence of union activity.

Also, the Respondent sought to show that it would not have hired the alleged discriminatees because of their failure and/or refusal to answer adequately the questions on the application. The judge rejected the contention. However, the judge made findings which are consistent with the contention that full applications were required and necessary. In this regard, the judge found:

> Almost without exception the applicants selected for employment filled the applications out completely and demonstrated substantial recent employment and a stable record of employment in recent years. They also listed supervisors' names and reasons for leaving. Smith, who was contacted by Respondent listed an IBEW apprenticeship program under the category for additional education. Smith's application was fully completed setting out five prior employers, listing the names and supervisors, and the type of work performed demonstrating a relatively stable work history in the highly mobile construction industry. Smith's past employment was with nonunion contractors and he did not write IBEW or union organizer on the top of his application as did the overt salts. Conversely, the applications of the overt salts do not indicate with much specificity for whom they worked, what type of work they performed and who supervised them. While I do not

[1] Under *FES*, there are different tests for each of these. The judge decided this case before *FES*.

find that the failure to fill out every detail of their prior employment was fatal to their employment prospects, the lack of substantial information on the salt's applications provides the employer with only meager information on which to make the employment decision.

In addition, with respect to Butler, the remand instructed the judge to engage in a comparative analysis of the employment qualifications of the alleged discriminatees vis-a-vis those of the successful applicants. Notwithstanding this, the judge made no findings concerning Butler's qualifications. In my view, it is not clear from the testimony cited, or from other record evidence, whether Butler possessed superior qualifications for the Respondent's Vicksburg project, compared to those who were hired.

Reynolds' application listed three previous employers, for a total of 14 months' experience. His application did not identify the type of electrical experience he had (it appears that the Vicksburg project involved industrial electrical work, as opposed to residential or commercial electrical work). As with Butler, it seems to me unclear whether Reynolds' experience was relevant to the Vicksburg project, as compared to those who were hired.

Yelverton's application identified one specific electrical contractor as a previous employer, indicating that he had worked for that contractor from September 1989 through November 1989 (he applied for work with the Respondent on August 17, 1994). As with Reynolds and Butler, I do not find that the record before us is a sufficient basis on which to make that determination.

For the reasons stated above, I have an additional basis for agreeing with my colleagues that a remand is the proper course.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten applicants for employment and employees with a refusal to take applications, a cessation in the hiring process, and a refusal to consider applications of applicants and employees and with unspecified reprisals because of their support for the International Brotherhood of Electrical Workers Local Union 480 or their engagement in protected concerted activities.

WE WILL NOT discriminate against applicants for employment by refusing to hire them because of their support of the Union or engagement in union activities.

WE WILL NOT discriminate against our employees by discharging them because of their support for the Union and their engagement in protected concerted activities the Union's behalf.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer to employees Robert Bolin, Joe Holloway, and other members of Foreman Steve Nolte's crew full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make whole these employees for any loss of earnings and other benefits resulting from their discharges, less any interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, offer to Gary Greer, James Hill, and Mike Mapp employment in jobs for which they applied or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges to which they would have been entitled if they had been hired.

WE WILL make them whole, for any loss of earnings and other benefits resulting from the discrimination against them, less any interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges or refusals to hire and WE WILL, within 3 days thereafter, notify each of the employees and applicants in writing that this has been done and that the unlawful discharges or refusals to hire will not be used against them in any way.

H. B. ZACHRY COMPANY

Susan B. Greenberg, Esq., for the General Counsel.
Dion Kohler, Esq. (Ogletree, Deakins, Nash, Smoak & Stewart), of Atlanta, Georgia, for the Respondent.
Wayne Divine, Assistant Business Manager and Organizer, of Jackson, Mississippi, for the Charging Party.

DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This case was heard before me on March 22 and 23, 1995, in Jackson, Mississippi, and was held pursuant to a complaint issued by the Acting Regional Director for Region 26 of the National Labor Relations Board (the Board) on November 30, 1994. The complaint is based on an amended charge filed by International Brotherhood of Electrical Workers, Local Union 480 (the Union or the Charging Party) on November 30, 1994. The complaint alleges that H. B. Zachry Company (the Respondent or the Company) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by advising an employee that there would not be any hiring as a result of union applications that Respondent had received, by interrogating an applicant regarding his union activity, by advising an applicant that there was a freeze on hiring as a result of the presence of union applicants and by telling an employee that the Union had better not send any union electricians to the job. The complaint also alleges that Respondent refused to employ Mike Mapp, James Hill, William Reynolds, Thomas Butler, Gary Greer, and Sammy Yelverton and laid off its employees Robert Bolin, Joe Holloway and others because of their engagement in concerted activities protected by Section 7 of the Act, all in violation of Section 8(a)(1) and (3) of the Act. The Respondent by its answer filed on December 12, 1994, denies the commission of any violations of the Act and asserts several affirmative defenses including an assertion that the claims are barred by the 6-month statute of limitations set forth in Section 10(b) of the Act, that the alleged discriminatees were not bona fide applicants for employment and, thus, are not "employees" within the meaning of the Act and that to the extent that any alleged discriminatee is a paid union organizer, the Board is collaterally estopped from asserting Respondent violated the Act.

On the entire record in this proceeding, including my observations of the witnesses who testified herein, and after due consideration of the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

A. The Business of Respondent

The complaint alleges, Respondent admits and I find the Respondent was and has been at all times material, a corporation with an office and place of business in San Antonio, Texas, that it has been engaged in the business of electrical construction at the Vicksburg Chemical Plant in Vicksburg, Mississippi, hereinafter referred to as "the jobsite," that during the 12-month period ending November 30, 1994, Respondent, in conducting its business operations described above, performed services in excess of $50,000 in States other than the State of Mississippi and purchased and received at its jobsite goods valued in excess of $50,000 directly from points located outside the State of Mississippi and that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

B. The Labor Organization

The complaint alleges, Respondent admits, and I find that the Union is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES[1]

A. Background

Respondent operates as a general contractor and performs construction at various sites in certain parts of the United States and is involved in electrical contracting. Respondent operates as a nonunion contractor and has resisted its employees joining unions in the past. See *H. B. Zachry*, 233 NLRB 1143 (1977); *Willmar Electric Service v. NLRB*, 968 F.2d 1327 (D.C. Cir. 1992), and *H. B. Zachry Co.*, 310 NLRB 1037 (1993), and cases cited therein. Respondent's corporate office is in San Antonio, Texas, and its human resources division is also maintained there and is headed by Steve Hoech. The human resources division is responsible for the Respondent's labor relations at its jobsites throughout the country. Respondent has several divisions in its corporate hierarchy including the Industrial, Maintenance and Service Division (IMSD) which maintains its central office in Houston, Texas, and which directed the electrical work at the Vicksburg Chemical Plant jobsite involved in this case. According to the unrebutted testimony of electrical instrumentation superintendent Mickey Cain which testimony, I credit in this regard, the human resources division in San Antonio, Texas, is responsible for labor relations of the electrical division including the Vicksburg, Mississippi jobsite. Respondent commenced its operations on the Vicksburg jobsite in March 1994. This case involves the hiring and employment practices engaged in by Respondent and alleged violations of the Act in the late summer and fall of 1994 at the Vicksburg jobsite. It also involves issues of alleged "salting" by the Union and its members. Salting is a practice developed by the International Brotherhood of Electrical Workers wherein its members apply for work at nonunion employers engaged in the construction industry in order to organize their employees. The practice is fostered and supported by the Unions and permission is granted to the Union's members to work at nonunion jobsites at below union scale wages and without benefits. In some cases the local unions pay the union health insurance and pension benefits usually covered by a contractor who is signatory to a labor agreement with the Union.

On August 12, Union Assistant Business Agent and Organizer Wayne Divine took several employees out to the jobsite who also filled out applications for employment and wrote that they were voluntary union organizers. On August 17, 1994, several members of the Union were taken to the jobsite by the Union's Assistant Business Manager Sammy Yelverton and they and Yelverton filled out applications for employment at the jobsite. Yelverton is a full-time paid assistant business agent and organizer for the Union. Each of the applicants wore

[1] The complaint as amended alleges, Respondent admits, and I find that at all times material, Mickey Cain, superintendent; Steve Nolte, foreman; Floyd Livingston, general foreman, and Randy Haigler, foreman have been supervisors within the meaning of Sec. 2(11) of the Act and agents of Respondent within the meaning of Sec. 2(13) of the Act.

union insignia or buttons and wrote on the face of their applications that they were voluntary union organizers. Additionally, Yelverton wrote that he was a paid union organizer and listed his position as an assistant business manager and organizer for the Union. None of these applicants were hired whereas other applicants who did not make any notations or otherwise present themselves as voluntary organizers were hired in August and September 1994. During this period the Respondent's electrical superintendent Mickey Cain, is alleged to have told employee Tommy Dearing that he could not take applications because the Union had struck on him and told employee Randell Wallace that he could not hire a friend of Wallace's because he had applications filled out with "union organizers" written on the top of the applications and they had to go in order on his application." There is no contention that there was a strike during this period, but the reference to the Union having struck on Cain is apparently a reference to the Union's members having filed applications for employment on August 12 and 17, 1994. In addition Respondent's foreman Randy Haigler is alleged to have made a statement in the presence of employees that the Union had better not attempt to come in here in reference to Respondent's job at the Vicksburg Chemical Plant jobsite and to have also said we have ways of getting around this in reference to the Union's members having filed applications for employment. Respondent concedes that Yelverton was not considered eligible for hire because he is a paid union organizer and Respondent contends as such he was not an "employee" under the Act and was not entitled to the protection of the Act afforded employees.

Additionally three members of one of Respondent's crews (Tommy Dearing, Robert Bolin, and Joe Holloway) all handed out union leaflets in the employee parking lot on October 6, 1994, prior to the start of their workday and attended a safety meeting wearing prounion insignia shortly after their commencement of work on that date. At 2 p.m. the entire crew on which they were working was laid off on that date. The General Counsel alleges that the layoff was discriminatory as there was still work remaining to be done on that date. Bolin and Holloway and others on the crew are alleged as victims of unlawful discrimination as a result of the layoff. Dearing had previously advised the management of Respondent that he was quitting on that date and had agreed to work until 2 p.m. and is not alleged as a discriminatee.

The General Counsel presented several witnesses. Randall Wallace testified as follows: He commenced working for Respondent as a journeyman electrician at the Vicksburg jobsite on August 3, 1994. In April 1994, shortly after the Respondent put up its mobile office at the jobsite he filed an application for employment with Respondent along with his cousin who also applied. He did not wear any union insignia or indicate union membership on his application. On August 1, he went back to the job trailer and asked the woman in the trailer if Respondent was hiring electricians. She replied that she thought so. He asked to speak to Job Superintendent Mickey Cain and was able to talk to Cain about 1:30 to 2 p.m. He asked Cain if he was hiring electricians and told Cain he had heard from his cousin Chris that Respondent was hiring. Cain offered to let him fill out an application and he told Cain he had already filled out an application. Cain then retrieved the application he had previously filled out in April and permitted him to fill out information for a preemployment drug test which Respondent requires of its applicants for employment and told him to report for work on August 3 which he did. There was no mention of the Union in this conversation. On August 12 between 2 and 4 p.m. at the motor control center in the presence of Cain and General Foreman Floyd Livingston, he asked Cain about hiring a friend of his and Cain said he could not, "Because he had applications that was filled out and had 'union organizers' wrote on top of them. He couldn't hire them because he had to go in order on his application." This ended the conversation. He worked until the end of September when he left his employment due to nonwork-related personal reasons. During his employment he observed carpenters, laborers, and the man who had given him a drug test pulling electrical wire. He observed these three employees doing his work every day for about a week and a half during the last part of his employment. On cross-examination he testified he was unaware that on August 12 some individuals had applied for work and written "union organizer" on their applications. All of the five immediate past employers he had listed on his applications were nonunion employers. Prior to applying for work at the Respondent's jobsite he asked Union Assistant Business Manager Wayne Divine if he could apply there so he would not get into trouble with the Union. He had previously been a member of another local union for 6 years and became a member of Local 480 in June or July 1994. Divine did not give him any instructions regarding his application for employment with Respondent.

Tommy Dearing testified as follows: He filed an application for employment on August 18, 1994, and was called on September 21 and took a drug test on September 22 and went to work on September 25 as a journeyman electrician. He installed pipe and pulled electrical wire. His supervisor was Steve Nolte. On August 18 he spoke to Superintendent Mickey Cain about 10:30 a.m. Cain told him "the Union had been out there the day before and struck on—as I recall, he claimed they striked him or—and that they weren't taking applications at that time because of that." However, Dearing was permitted to fill out an application that morning. He was called into work on September 21 and took a drug test on September 22 and had to wait for the results and started on September 25. On September 26 while he was in the motor control room at the jobsite with Doug Harvard, the electrician's welder and foreman Randy Haigler, someone mentioned the union and Haigler said, "there better not be any union, you know, organization out there or they would—they had ways of getting around it, you know." On October 6, he and two other employees (journeymen electricians Robert Bolin and Joe Holloway) wore union T-shirts stating International Brotherhood of Electrical Workers onto the job and handed out union handbills before work prior to the start of their shift at 7 a.m. Subsequently there was a layoff that afternoon. At the time of the layoff he estimated there were 3 or 4 more days of work on the specific project he was working on. He worked 11 days for the Respondent. Holloway had been wearing a union button a couple of weeks prior to October 6. Dearing quit his employment with Respondent because he had another job. He was not laid off. Prior to applying with

Respondent for work, he spoke to Assistant Business Manager Wayne Divine but he does not recall the substance of this conversation. He is aware he was acting as a "salt" in applying for employment with Respondent. He received no instructions from Divine. He did not receive any compensation from the Union nor any health and welfare coverage while he was working for the Respondent.

Union Assistant Business Agent and Organizer Sammy Yelverton testified as follows: On August 17, 1994, at approximately 9:30 a.m. he and union members and journeymen electricians Tom Butler, Billy Brady, Gary Greer, George Meyer, Don Smith and Assistant Business Manager Wayne Divine went to Respondent's jobsite and asked to fill out applications. The secretary gave them applications and they were instructed to go outside the trailer office to fill them out which they did. He wrote union organizer, Local Union 480, as his present employer and IBEW Local Union 1529 in November 1989 as his previous employer. He also listed Capital Electric Company a union contractor out of Leavenworth, Kansas, as a previous employer and NECA, the National Electrical Contractors Association, an association of union contractors, as previous employers. He listed 22 years of electrical experience on his application. General Counsel's Exhibit 4 is the application he filled out and gave to Respondent. At the hearing this application contained the notation, "Paid union organizer, not eligible, per Chuck Mitchell." On his application he listed two home phone numbers both of which have recorders attached to them. He has never received an offer of employment from the Respondent. When they applied for work at Respondent they were engaging in salting by trying to be hired in order to organize the Respondent's employees on behalf of the Union. "Every applicant either had an IBEW T-shirt, cap, organizer button, or something of that nature, and all the individuals were instructed to write 'Union organizer' across their application." He intended to go to work for Respondent if he had been hired. Five days prior to August 17, some members of the Union had applied for work with Respondent at the jobsite and had also written union organizer on their applications. At the time he applied he was a full-time employee of the Union and is compensated for this position by the Union. If he had been hired by Respondent, he would have remained employed by the Union. He reports to Union Business Manager Edward E. Douglas. As an organizer he has a right to go to work for any nonunion contractor he chooses in order to organize and take members into the Union. In addition to his organizing responsibilities he also has other duties as an assistant business manager. If he had been hired by Respondent, his salary and benefits with the IBEW would continue as would his duties as an organizer and as an assistant business manager. He is not aware that Respondent contacted or attempted to contact Davis Greer for employment. He is not aware whether Meyer was contacted for employment by Respondent. Donald Smith was contacted for employment. He maintains that the phone number listed by Brady on his application is a valid phone number. He did not give the other applicants any instructions in the event they were contacted by Respondent. He acknowledges that the Union's members can be directed by the Union to leave their employment with any contractor whether it is union or nonunion at any time. Members cannot go to work for a nonunion contractor unless specifically authorized to do so by the Union. In the past members engaged in salting activities have been covered for their health insurance by the Union, but their pension contributions have not been covered by the Union. Members are not otherwise reimbursed for expenses incurred in salting activity nor have they been compensated for engaging in salting activities. It has not been a requirement that a member acting as a salt quit his employment after an organizing campaign is over. Rather it is his own choice.

William Reynolds testified as follows: He applied for work at the Respondent's jobsite on August 12, 1994, and went with Wayne Divine (Bubba) Hill, and Mike Mapp. He is a journeyman electrician and a member of the Union and he wrote on the top of his application that he belonged to Local Union 480, IBEW. The lady who gave them the applications at Respondent's trailer office said they were hiring some and laying off some. When he applied, he was wearing a cap with an IBEW insignia on it and a shirt with IBEW on it and a badge that said "Union Organizer." On his application he listed all union contractors as his previous employers. He has never received an offer of employment from Respondent. To his knowledge no one from Respondent attempted to contact him on September 21, 1994, or at any other time. He put his regular telephone number on his application and he has call forwarding to his sisters home where there was someone available to answer the telephone 24 hours a day. Prior to applying with Respondent, his union representatives asked him if he wanted to go to work and he replied in the affirmative and they told him that the Respondent was hiring at the Vicksburg Chemical Plant and asked if he wanted to go there with them which he agreed to do. The union representatives did not give him any instructions as to what to do if he were hired by Respondent other than to go to work if he was hired. On his application he listed the home offices of the contractors he had worked for rather than the locations where he had worked because the offices are no longer maintained on the jobsites after the projects are completed. He wrote only three employers down on the application although lines were supplied for five employers and although he had substantially more experience than with the three employers listed on his application. In September or October 1994, he checked with Wayne Divine at the Union as to whether they had heard from Zachry as he, himself, had not been contacted and they said they didn't know if anyone had been hired.

The General Counsel called Judy Walker to the stand. Walker is the sister of William Reynolds and it was her telephone number that Walker testified his calls had been forwarded to during the period involved in this proceeding. At that point counsel for Respondent stipulated that the Respondent had not attempted to contact Reynolds for employment and Walker was excused.

The General Counsel called Gary Greer who testified as follows: He applied for work with the Respondent as a journeyman electrician on August 17, 1994. He rode to the jobsite with Wayne Divine. He was unemployed at the time and would have gone to work for the Respondent if he had been hired. He is a member of the IBEW and wrote IBEW organizer

on the top of his application. A woman inside the trailer office at the jobsite gave them applications. At the time he applied, he wore an IBEW organizing button or T-shirt or jacket but he is not sure which one he wore. He has never received an offer of employment from Respondent, nor been contacted by the Respondent. He identified his home phone number and the number of the union hall on his application and verified that they are correct numbers. He also has caller ID and call Forwarding which registers his calls. On his application he applied for a journeyman electrician position. When he applied Divine told him to write IBEW organizer on the front of the application. He had been unemployed since February 1994 at the time of the hearing.

Michael Mapp testified as follows: He applied for work as a journeyman electrician with Respondent on August 12, 1994, with James (Bubba) Hill, Buddy Reynolds, and Wayne Divine. He was unemployed at the time, intended to go to work for Respondent if hired and believed he had a right to accept the job if it were offered. He is a member of the IBEW and has been for 25 years. He is a wireman. He wrote on the top of his application that he was a member of the IBEW Local 480. He also wore a union pin on his shirt. He has never received an offer of employment from Respondent nor has he been contacted for work at any time by Respondent. His correct home phone number is on his application and he lives with his wife and two children but no one at his home has told him that Respondent tried to contact him. He went to work for Prime Electric around August 20 and is still employed there. During regular business hours he is at work. Divine told him to indicate his union membership on the top of his application. After he applied to Respondent for work he did not have any further contact with the Union concerning his application. At the time he applied he was wearing an IBEW organizer button. He held no union office at the time he submitted his application.

James "Bubba" Hill testified as follows: He applied for work with Respondent on August 12, 1994. He went to the jobsite with Divine and Reynolds and Mapp and filled out an application for employment. At the time he did not have a job and intended to go to work for Respondent if he were hired and believed he had a right to do so. He has been a member of the IBEW since October 1973 and is a journeyman electrician. He does not hold any paid position with the Union. He wrote union organizer on the top of his application. When he applied he had on his IBEW shirt and had an IBEW organizer button on. He has never received an offer of employment from the Respondent and no one from the Respondent contacted him on September 21, 1994. He contacted the Respondent on August 30 and September 19. On August 30 he called Respondent and talked to a woman he assumed to be a secretary. He told her his name and that he had filled out an application on August 12, and was out of Local Union 480 and asked her if Respondent was hiring. She said they were not hiring at that time but would be hiring later. He asked her to call him. He called again on September 19 and talked to the lady again and again gave her his name, told her he had filled out an application on August 12, that he was out of Local 480 and that he was checking to see if they were hiring yet. She told him she could not tell him and that he would have to talk to a lady named Charlene Walker. He again gave her his home phone which was the same one he had put on his application. No one has called him from Respondent. He has an answering machine which is on all the time and he has not received any messages on his answering machine from Respondent. He has also not received any letters, correspondence or telegrams from Respondent notifying him that they are interested in hiring him. He usually checks his messages on his answering machine every day but can skip checking it a day or so. He lives with his mother.

Thomas Butler, Sr. testified as follows: He applied for work as an electrician with Respondent on August 17, 1994, along with Yelverton, Don Smith, and Billy Brady, and Divine was in another automobile with two other men. He was unemployed at the time and intended to go to work for Respondent if he were hired and believed he had a right to do so. He wrote IBEW organizer at the top of his application. He listed two telephone numbers. One was the number of Local 480's union hall and the other was his home phone number. When he applied he turned his application into the secretary who said the Respondent was not hiring then and that they would probably contact him later. At the time he applied he wore a button pinned to his shirt which said union organizer. He has never received an offer of employment from Respondent. There is a category on the application which asks if the applicant is willing to work out of town and he put down "50 miles." No one from Respondent questioned him about this designation. It was stipulated by the parties that Butler was not called by Zachry. On cross-examination he contended that it was his idea to write the words union organizer on his application.

Robert Bolin testified as follows: He applied for work as an electrician at Respondent's Vicksburg jobsite on August 20, and was taken to the jobsite by Tommy Dearing to the job trailer where he filled out an application and turned it in that day. He was not a member of the IBEW at that time and he did not indicate any union affiliation on his application and did not wear any union insignia on the day he applied. About a month latter he received a telephone call from Cain who told him to come over the next day for a drug test. Cain also asked if he knew how to locate Dearing as he was being hired also. Either in that conversation or in a conversation the next day, Cain told him Respondent was going to hire four or five more electricians. He reported to Steve Nolte's crew and was working 11-hour days from 7 a.m. to 6 or 6:30 p.m. One of the members of his crew was a carpenter and another member had no experience as an electrician and worked with him as a helper. On his first day of work on September 25, 1994, Cain told him they would be working 11 hours a day, 7 days a week for the next 6 to 8 weeks. He worked at the new section which was being built and there was "quite a bit left to do." On the morning of October 6, 1994, he and Holloway, and Dearing handbilled on behalf of the Union outside the gates and at a sign-in table before you enter the jobsite and then went to a safety meeting. They originally had started handbilling at the parking lot which was up the hill from the plant and then by the sign-in table. They handbilled about a half hour before the start of their shift and then 15 to 20 minutes at lunchtime. This morning there were two meetings, one large safety meeting generally held once a month attended by general management such as Cain

and a second one held on the jobsite by the foreman. At the meeting he wore an IBEW Comet T-shirt and an IBEW organizer badge. After lunch that day around 2 or 3 p.m., Foremen Steve Nolte came by and told him he was laid off but did not give him a reason for the layoff. At the time of the layoff he estimates there was a couple of months more work to do. At the time he applied he listed over 5 years' experience as an electrician. Cain called him twice on September 21 for employment. He could possibly he confusing the two safety meetings. Dearing quit work on October 6. He heard him tell Nolte this in the morning and Nolte asked Dearing if he could stay and work until 2 p.m. and Dearing agreed to do so. When they walked back to the job trailer after being laid off, the employees on Nolte's crew were given a form saying they were laid off as a result of a reduction in force. On cross-examination after reviewing his affidavit he acknowledged that Nolte had told him he was being laid off as a result of a reduction-in-force at the time Nolte announced the layoff to him. He joined the IBEW after he went to work for the Respondent. Holloway had been wearing an IBEW organizer badge for 11 days prior to the layoff.

Joe E. Holloway testified he worked as an electrician for Respondent at the Vicksburg jobsite from August 17 until October 6, 1994. He heard about his job when he went by the Union hall inquiring about work and was told by the dispatcher that Respondent was hiring. At the time he was not a member of the Union but has been since November 1994. At the time he applied for work to Respondent's jobsite, he did not indicate any union affiliation on his application. He did not wear any union insignia such as a button or T-shirt. He filled out his application on August 4 or 5, 1994. Cain telephoned him the Friday prior to August 17 and told him if he was interested to come in to take a drug test for work. He was supervised by Foremen Randy Haigler and Bill Tidwell. He asked the General Foreman Floyd Livingston how long the job would last and Livingston told him it would last "probably about eight weeks." The first week of his employment he pulled cable and ran conduit in and around the main control room. He was subsequently transferred to the night shift after a week and a half on the job where he remained for a little over 2 weeks. On September 21, he was transferred back to the day shift as the night shift was eliminated. He began wearing an IBEW button around September 21. Prior to this he had discussed the Union with his night-shift foreman, Steve Nolte about four to six times during the course of his employment. During his later conversation with Nolte, he told Nolte that he was in favor of the Union. There were other crafts on the jobsite and there were times when supervision recruited other personnel to help on wire pulls and cable pulls. On one occasion a laborer-carpenter was assisting in pulling cable about a week before the layoff. On another occasion, an employee was transferred out of the safety department to assist in the cable pulling. On one occasion scaffold builders assisted in pulling feeders from one control unit to another control unit. On the morning of October 6, 1994, he and Bolin and Dearing handbilled on behalf of the Union prior to work. He wore a comet union shirt and handbilled close to the sign-in and out area in the vicinity of Respondent's office for 10 to 15 minutes. After he finished handbilling, he left his handbills at the sign-in table and went in to work. He then went to the superintendent and general foreman's trailer for a safety meeting for the electrical craft and the electrical fitters and the supervisors of the electrical department. He recalls Livingston, Haigler, Nolte, and Bill (Tidwell) were at the meeting but does not recall whether Cain was there. This meeting lasted about 10 minutes. He wore the comet union T-shirt and a union button on it and had a union insignia on his hard hat. About 12 to 15 people attended the meeting. After the meeting the employees disbursed to their work stations. At about 2 p.m. his foreman Nolte came up to him and asked him, "if I wanted to stop work." At the time he was in the south MCC room and he and other employees were beginning to hook up the controls in the PC cabinet and there were a hundred more terminations of individual cables to be made in that cabinet which would have taken him 5 more days to complete. In addition, none of the motors had been terminated within the switch gear. Some of the cables had not been pulled to the motors and the motors had not been terminated. He said sure and asked Nolte if this was a layoff and Nolte said yes. Everyone in the crew except Nolte was laid off. He received the information about the Respondent hiring prior to his application and had discussed with union representatives about applying for membership in the Union. He had been a member of the IBEW for 10 years until 1990 and was in good standing when he terminated his membership. Three employers he listed on his application for a period prior to 1990 were union contractors.

In addition the parties stipulated as to authenticity to a series of exhibits consisting of applications and personnel records of employees who were hired for the Vicksburg job by Respondent and they were received into evidence. The General Counsel also filed a post hearing exhibit of telephone company records of the Respondent which is hereby received in evidence as General Counsel's Exhibit 27.

The Respondent called in its case witnesses who testified as follows: Wayne A. Divine is a full-time paid organizer and assistant business manager of the Union who engages in salting activities in order to organize nonunion contractors. Divine applied for work at the Respondent and wrote IBEW member or organizer across the top of the application. Divine is not alleged as a discriminatee. He instructs members to write this across the top of their applications when they apply for work with nonunion contractors. The Union made payments to its health and welfare plan on behalf of its members acting as salts in 1994. On August 12, 1994, he drove a group of applicants to apply for work at Respondent's jobsite and instructed them to write that they were union members or organizers on their applications. They were all unemployed and looking for jobs. They went to the jobsite to organize Respondent on that project. He told them to contact him if they were contacted by Respondent and to give him reports. If they had been hired, they would have been salts.

Randy Haigler served as an electrical foreman on Respondent's Vicksburg jobsite from June through November 1994. He reported to General Foreman Floyd Livingston and Superintendent Mickey Cain. He denied ever having told an employee of Respondent on this project that there had better not be any organizing on the job, or that the Respondent had ways of get-

ting around that. He denied ever having discussed any union issues with any of Respondent's employees while working on the Vicksburg jobsite. Cain met with him and the other foremen and told them that as long as employees did not pass out information about organizing during work hours, they were to leave them alone.

Superintendent Mickey Cain works for Respondent's Industrial Maintenance Division out of Houston, Texas. This is separate from Respondent's power division which is headquarted in San Antonio, Texas. He was the electrical instrumentation superintendent for the Vicksburg project. Respondent was the general contractor for this project. He arrived on the site around the first of June. Originally they anticipated completing the electrical work around the first of September. However, there were delays of engineering drawings and material deliveries and it was not until mid-September when all of the engineering drawings were received. When the project peaked around the first of October there were between 175 and 200 employees on the jobsite including all crafts. The electrical work was completed on November 6. He, himself, left the jobsite on November 4. He reported to Andy Power the overall project manager while he was on the jobsite. He, himself, was in charge of electrical instrumentation. He ensured there was sufficient manpower on the jobsite and sufficient material, tooling, and equipment and was responsible for the quality of the electrical work. He had the responsibility for the hiring of electricians and electricians' helpers. The supervisory line consisted of General Foreman Floyd Livingston and Electrical Foremen Randy Haigler, Bill Tidwell and Steve Nolte. Nolte had the least experience of the foremen and his crew was the last one formed. Nolte was hired as a journeyman electrician and promoted to foreman. Applications were taken in the Respondent's administration office for the electrical craft which was located in a trailer office right outside of the fenced-in area of the plant site. Additionally he had a container inside the fenced in area where he worked. Applications were taken by the office manager and a clerk in the office trailer. He never instructed them not to give out applications and never observed them telling anyone that Respondent was not taking applications. On occasion other clerks who worked in the field offices would answer the phone and take messages if one of the trailer office personnel had to leave. These clerks would have no knowledge of the hiring needs in the electrical craft. Once an application is submitted by an applicant, they are categorized by craft such as electricians or helpers, pipefitters, welders, and the like. There were numerous phone calls received every day from people seeking work which were usually not returned unless they were hiring or if they knew the employee. The need for employees is determined by the progress of the job. As other crafts move on, the electricians are usually the last ones in an area to finish up. When he needed electricians, he would call other of Respondent's jobsites to determine if they were having a layoff and employees from those jobsites were becoming available. He also took recommendations from current employees and after these two sources would then review application files for prospective employees based on their credentials. Respondent prefers to hire former employees. Employees are not transferred from one jobsite to another but have to have been terminated by Respondent from the other jobsite, given a good recommendation and be rehired on the new jobsite. They cannot quit a job and come to his jobsite. He is able to reject the applicant if he chooses. He can call the district office in Houston and obtain a printout on any former employees who apply on his jobsite. The printout will show their dates of hire and termination reasons for leaving and the like. It usually contains information about their work performance. He receives recommendations from supervisors in their crafts or other crafts and they are a second choice after former employees. He has followed this practice throughout his 20-year employment by Respondent. In those instances where he does not have enough applicants from the preferred sources, he reviews the applications filed at his office and looks for experience, longevity on jobsites where possible, and a good list of jobsites and employers which show what they have done. He looks for electricians who have worked on industrial jobs rather than commercial experience. Most industrial work is exposed and can be seen and everything must be plumb and square because it is visible. Quality craftsmen are needed to do quality work. Industrial Work is more complicated than commercial or residential work. After he reviews the applications, he calls prospective employees. On this particular jobsite it took approximately 3 days from the date of the call to their first day on the job. He would call them, discuss the job briefly on the phone, ask them to come in the next workday for a preemployment drug test and usually meet and talk to them briefly at that time and await the result of the drug test which usually took 1 or 2 days. Often it took longer than 3 days. The scheduled completion date for the electrical work was changing as a result of delays in obtaining drawings and the like. As of September 25, the scheduled completion date was approximately the end of October or the first of November. Normally he did not make an applicant an offer over the telephone but waited until he spoke with them briefly at the jobsite. When he telephones an applicant and the number is incorrect, or disconnected or the call will not go through, he writes "bad phone number" on the top of the application. If there is no answer, he writes "no answer" and goes on to the next application. If he gets an answering machine, he leaves a message but also writes "no answer" on the application as he has left numerous messages and not obtained a response in the past. He identified applicant Mike Mapp's application (R. Exh. 6(a)) with a notation he made which starts with "called no answer" which indicates he called and either got an answering machine or there was no answer at all. The top of the application bears a notation "Member IBEW 480" which he did not make. He also identified the application (R. Exh. 6b) of applicant James Hill which bears the notation made by him "called 9/21/94, no answer," "IBEW Number 480 member." He also identified Gary Greer's application (G.C. Exh. 20) and testified he attempted to call Greer whose application bears the notation made by him "No answer 9/21/94" Greer wrote "IBEW organizer" on the top of his application. Respondent's Exhibit 6(c) is an application of George Myrick. He attempted to contact Myrick regarding employment and wrote "Left message with wife, 9/21/94" on the application. Myrick had written "IBEW organizer" on the top of his application. He also contacted applicant Donald Smith regarding

employment and noted on the top of the August 17, 1994, application (R. Exh. 6(d)) that he had left a message with Smith's mother on September 21, 1994. Billy Brady also applied on August 17, 1994. He attempted to telephone Brady but reached a recording stating it was "a bad phone number" on the top of Brady's application. Brady had written "IBEW Union organizer" on the top of his application. Respondent's Exhibit 7 is the South Central telephone bill of Vicksburg Chemical for the jobsite which phones were used by Respondent. Respondent's Exhibit 8(a) is the application of Randall Perrigin who applied on August 18, 1994. He attempted to telephone Perrigin on September 21, and noted on the top of the page that there was no answer. Perrigin was not hired. Respondent's Exhibit 8(b) is the application of Lehon Young who he called on September 21, but he received no answer and Young was not hired. Respondent's Exhibit 10(a) is Randall Wallace's application and contains a notation under the notes section of the application "National Guard." Wallace had applied early but by the time he was ready to hire him, Wallace had a 2-week duty obligation with the National Guard. He called Wallace shortly before Wallace left and Wallace asked if Cain would hold the job open for him until he completed his National Guard duty and Cain agreed to do so. Wallace went to work with Respondent on August 15 and Cain knew before August 12 that he would be hiring Wallace about August 15. Respondent's Exhibit 10(b) is the application of Mark Ashe. He was supposed to begin work on September 15. Ashe came in for an interview and was signed up but said he had other business to attend to and never showed up. Ashe had been referred by a current employee. Respondent's Exhibit 10(c) is the employee request form for Johnny Wier and shows that his drug test was scheduled for August 12. Respondent's Exhibit 10(d) is an employee request form showing that H. Norman Wilkinson was scheduled to take his drug test on August 12, which indicates he (Cain) would have contacted him prior to that date for employment. Respondent's Exhibit 9(f) is the application of Douglas Knight, Jr. which indicates he served as an inside wireman on his last job. This means he was a hookup man or terminated cables in junction boxes or motors and the like which is the type of experience he was looking for at the time. Respondent's Exhibit 11 is the application of Thomas Butler which bears the notation he (Cain) made at the top "out of 50 mile range." Butler had indicated on his job application that he would accept work only within a 50 mile range of his home and his address indicated the jobsite was approximately 100 miles from his home. Butler's comment had been made in response to a question on the application "Would you accept employment out of town? Yes No." Respondent did have another jobsite in Natchez, Mississippi, which was close to Butler's home, but they were not hiring at the time. Reynold's application indicated only three employers none of which he (Cain) was familiar with. Yelverton's application listed only one definite employer where he had worked from September to November 1989 as a journeyman electrician. His experience as a business manager and assistant business manager was not relevant to the work for which he (Cain) was seeking electricians. Additionally he (Cain) received instructions from Chuck Mitchell, the personnel manager out of Respondent's Houston district offices that he did not have to employ a paid union official.

Cain testified further that the layoff of October 6 occurred following a weekly meeting with Vicksburg Chemical Company which he attended on that date. At that meeting the Vicksburg Chemical Company construction manager told him they were having financial difficulties and directed him to reduce the size of the work force to cut costs and also offered to assist Respondent in its work by using Vicksburg plant electricians in order to acquaint these plant electricians with the controls of the system being installed. There was no discussion during this meeting about union organizing activities or about union handbilling. He decided to lay off Nolte's crew as it was comprised of the less senior employees. Additionally he was aware that some employees on Nolte's crew wanted to leave the project. Startham was a former employee of Respondent who needed to return home as his wife was pregnant. After his meeting with Vicksburg he learned that Dearing had asked to quit the job at 2 p.m. and Nolte had agreed to this. Holloway had expressed to Nolte on several occasions that he wanted to be included in the first layoff. There were three other employees laid off from the crew. Nolte was demoted to a journeyman and went back to his tools. On October 6, Holloway had been terminating inside the DCS cabinet which was the main computer frame cabinet in the wet area. There were a substantial number of terminations left to be completed which were finished by Vicksburg Chemical Company personnel. He first saw the Union handbill on the morning of October 6 when one of the clerks brought it in to him after she had picked up the sign in sheets at the sign in table that morning. He did not attend the safety meeting on that morning.

On August 18, Tommy Dearing applied for work and talked to him. Dearing had already filled out an application and one of the clerks told him there were a couple of electricians outside waiting to talk to him and she handed him Dearing's application and he went outside and spoke with them. Dearing asked about the jobsite, the pay, and how long the job would last. Dearing did not ask him for an application. Dearing did not tell him that he had tried to get an application from one of the clerks and had been refused. He (Cain) did not tell Dearing that the Union had been there the day before. He did not tell Dearing that there had been a strike on the job, or that the reason he could not take his application was because of this strike. He did not know Dearing at the time.

Randy Wallace was hired by him on August 12 and on that date Wallace asked him if he still needed helpers as he had a helper friend. He told Wallace that he had already contacted several helpers and was awaiting their response as to whether they were going to come in or not and that if they did not come in he would see what he could do. He did not tell Wallace that he could not hire his friend because he had received some applications with "Union organizer" written on them. The next time he hired a worker he had not talked to prior to August 12 was approximately a month later in September.

It is a common practice of Respondent to utilize helpers in any craft rather than hire helpers for specific 2- or 3-day jobs and then lay them off. Respondent's various contractors on the jobsite borrow helpers from one craft to another. In addition

Respondent has an ongoing cross-training program where employees may be trained in other crafts. There was a young man who had been injured early in the project and was restricted to light duty who worked in the safety office and also worked as an electrical helper. At the time of his injury he was a carpenter helper. After he came off of light duty the carpenters were in a layoff stage of the project and the employee asked if he had an opening for an electrical helper. He did, so the employee came over to the electrical craft as a helper. Electrical helpers start out pulling cable, a lot of manual labor, fetching things, and are trained in bending and cutting conduit, some installation of the conduit and limited termination under direct supervision. A green helper is someone straight off the street who has never worked in the construction business. Paula Haigler, the wife of Foreman Randy Haigler, initially was hired as a clerk in the mornings and was finished at 10 or 11 a.m. and wanted to obtain some field experience. Randy Haigler had previously worked for him as a foreman and was an electrical teaching aide and he helped instruct her in helping pull wire, run conduit and in helping on some minor terminations. She was a green helper.

He contacted Robert Bolin for employment twice as he had called and talked to his wife earlier in the day who said he needed a job and told him he would return home about 6 or 6:30 p.m. Bolin had not called him back so he called Bolin back and Bolin had just walked in the door. It is highly unusually for him to call an applicant twice but he did so in this instance because his wife had seemed very interested in his going to work.

On cross-examination he acknowledged that he may have been mistaken about Mark Ashe and that he did show up for work. [Note: Respondent's attorney stated that the earlier stipulation between the parties regarding Mark Ashe was incorrect.] [The termination form [G.C. Exh. 21] of Mark Ashe shows that he was hired on September 15.] He estimates that he would have probably called Ashe on September 12 (assuming the normal 3-day period from telephone call to commencement of work). Johnny Weir's date of commencement of work was August 15 indicating he probably called him on August 11 or August 12. Norman Wilkinson's hire date was August 15 which would indicate that he came for his drug screen on August 12, indicating he called him on August 11 or August 12. Wilkinson was hired and given a badge number. The telephone numbers listed by Wier on his application were not in the 601 area code which encompasses Jackson, Mississippi. The application of Randall Wallace shows that he was a journeyman at the time of his application and listed experience between February 1990 and July 1994. Doug Knight's employment application shows he had about a year and a half of experience as an electrician (August 1993 through June 1994) at the time of his hire. Thurman Ferguson Jr.'s application shows he had about 4 years of experience in electrical construction at the time he was hired. General Counsel Exhibit 27 appears to be an application from a Wayne (Divine) with the last name unable to be read by Cain and he had no idea that Assistant Business Agent Wayne Devine had put in an application. He rejected Yelverton's application after his supervisor Andy Power (the project manager) discussed it with Chuck Mitchell and Mitchell informed him that Yelverton was not eligible for employment that Yelverton was not eligible for employment because he was a paid union organizer and also because Yelverton had not listed the names of previous contractors for whom he had worked. He was told to reject the application. Normally he makes this determination but in this instance Yelverton's application was rejected on the ground that he was a paid union organizer prior to any consideration of his qualifications. When they receive applications for employment, they maintain a file of the applications in folders at the jobsite. Respondent is a completely nonunion contractor.

Cain alone, determines who is to be called from among the applications he reviews. He interviews the applicants face to face when they come in following his call to them. He made the calls to applicants on September 21 because they had just received some more drawings, as the second phase of the project was commencing and they needed more employees. They were looking for three electricians and three helpers. The second phase of the project involved the wet area running conduit and also working in the motor control center encompassing the structural area involving motors, pumps and instruments. He called applicant Randall Perrigin on September 21, 19994, and did not get an answer to the call. At the time the rate of pay for an electrician was $13.50 per hour and Perrigin's application shows he was currently employed at Harris Electric at the rate of $16.82 per hour. He returned phone calls from applicants only 1 to 2 percent of the time. Foreman Nolte told him that Holloway had requested a layoff but he himself did not hear it from Holloway. Nolte was not at the hearing in this case. He also hired as helpers Pamela Haigler and Deborah Black who were inexperienced helpers. He also hired Sam Lungren as an electrician around August 20 and his application was in on August 1. He probably called Lungren around August 17. Lungren's application shows he had listed as some of his experience "brush-hogging."

Mark Codd is the manager of human resource administration for Respondent and is located in San Antonio, Texas. Codd testified that Respondent has a Companywide rule wherein they disqualify applicants who place extraneous information on their applications and the rule is written on one of the first lines of the applications. In this case it was determined that the rule would not be enforced at the Vicksburg strike because of an adverse ruling by an administrative law judge in a prior case involving Respondent which case is currently being appealed. Accordingly Respondent did not disqualify applicants at the Vicksburg jobsite who wrote "member of the IBEW" or "union organizer" on their application. This determination was made by his supervisor, Steven L. Hoech, on the advice of counsel. Hoech is the IMSD manager of employee relations.

At the end of the hearing the parties stipulated to a correction of some earlier stipulations. A previous stipulation that applicant Mark Ashe had a problem with his drug test was withdrawn, as was a previous stipulation that Wier was a no-show.

B. Contentions of the Parties

In its brief the General Counsel contends that the Respondent violated the Act as alleged in the complaint. With respect to the failure to hire William Reynolds, Mike Mapp, James Hill, Gary Geer, and Thomas Butler and the layoff, the General

Counsel urges that Cain's testimony should not be credited as he gave "inconsistent reasons for hiring and telephoning applicants, and made unsupported assertions with regard to the layoff." Thus his statements regarding the 8(a)(1) allegations are not to be credited. Nor are his unsupported statements regarding the need for a layoff because of the purported decision of Vicksburg Chemical Company to finish the electrical work with its own employees in order to familiaze them with the electrical equipment and because of monetary constraints. The layoff of Nolte's crew came on the same day that crew members Bolin, Holloway, and Dearing handbilled on behalf of the Union and after all three attended the safety meeting wearing prounion insignia. The General Counsel's witnesses should be credited concerning the antiunion statements made by Cain and foreman Haigler. In addition Respondent's history is replete with unfair labor practice violations, citing *H. B. Zachry Co*., 233 NLRB 1143 (1977); *H. B. Zachry Co*., 261 NLRB 681 (1982); *H. B. Zachry Co*., 266 NLRB 1127 (1983); *H. B. Zachry Co.,* 289 NLRB 838 (1988), enf. denied 886 F.2d 70 (4th Cir. 1991); *H. B. Zachry Co*., 310 NLRB 1037 (1993). The evidence clearly supports a finding that Respondent hired other employees around the union applicants ignoring the experience of the union applicants and giving inconsistent and shifting reasons for not hiring the union applicants. Respondent is relying on a sham whereby it called certain union applicants such as Greer at home and then hung up so that its records would show a call had been made but when it received no answer made no further attempts to call him such as it did in the case of Bolin who was called twice by Cain. Additionally Chris Wallace who was hired by Respondent was contacted other than by telephone indicating that Respondent did not rely on telephone calls alone to contact applicants for employment. In the case of Yelverton the General Counsel notes that Cain admitted that he refused to hire Yelverton because he was a union organizer and cites cases wherein the Board has held that paid union organizers are "employees within the meaning of Section 2(3) of the Act; citing *Sunland Construction Co*., 309 NLRB 1224, 1230 (1992); *H. B. Zachry Co.,* 289 NLRB 838 (1988) enf. denied 886 F.2d 70 (4th Cir. 1991), and others. The General Counsel also cites *Hanens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), wherein the Court found that "testers" who applied for jobs in order to determine if an employer engaged in racial discrimination were bonafide applicants for employment.

The Respondent contends that Cain followed Respondent's normal hiring procedures in accepting applications. Cain denied the comments attributed to him by Dearing and Wallace regarding the taking of applications and hiring of additional electricians. Respondent contends that there has been no showing of Cain's antiunion animus and that he followed the routine procedure of hiring Respondent's former employees who had been laid off from other of Respondent's jobsites first and then considering employees referred by supervisors and other employees and then considering applicants from among the applications made at the Vicksburg jobsite and calling for an interview those whose experience showed that they had the requisite substantial industrial experience for the Vicksburg job. It contends that certain of the union supporters were called for interviews but were not reached at the first call and that Cain then went on to consider other applications. With respect to Mapp it contends he listed out-of-state employers and was thus not called for an interview because of his lack of experience showing on the application, and in the case of Butler, that Cain did not call him because of his notation that he did not want to work beyond 50 miles from his home and the jobsite was in excess of 50 miles from his home. With respect to Yelverton, Respondent asserts that he was not considered for hire as he is not a bonafide "employee" under the Act because of his admitted status as a full-time paid union organizer and assistant business agent of the Union.

Analysis

I find that Respondent did violate Section 8(a)(1) of the Act through the statement by Cain to Dearing that he could not take any more applications because the Union had "struck on him" at the jobsite. This obviously refers to the filing of applications by the open union supporters rather than to any strike as it is undisputed that no strike occurred. I credit Dearing's testimony over Cain's denial that he made such a statement. I find that this statement by Cain was a violation of Section 8(a)(1) of the Act as it was inherently coercive conveying the message that the entire hiring process was stopped ("the taking of applications") because of the advent of union supporters applying for jobs.

I also credit Wallace's testimony that Cain told him he could not hire any more electricians because of the applications for employment made by union supporters. I also find this statement violated Section 8(a)(1) of the Act as it was inherently coercive conveying the message that Respondent would stop its hiring process because of the applications made by union supporters.

I also credit the testimony of Dearing that Foreman Haigler made the statement in his presence that the Unioin better not come on the job and that Respondent had ways of getting around this. I find this statement was also violative of Section 8(a)(1) of the Act as it conveyed an unspecified threat of reprisal if pro union employees applied for work with Respondent and also conveyed a threat of futility of union adherents applying for employment.

With respect to the Respondent's alleged failure and refusal to hire the union supporters named in the complaint because of their union activities, I find the General Counsel has established a prima facie case of violations of Section 8(a)(1) and (3) of the Act. Thus by virtue of the indication by the applicants on their applications that they were union members and supporters, Respondent clearly had knowledge of their union membership and support. Additionally, Respondent's animus toward unions and their supporters has clearly been established by the 8(a)(1) violations found, supra, and by the past violations found in the aforesaid cases cited by the General Counsel, supra, in which the Respondent was found to have violated the Act. I find after a review of all the evidence that the adverse employment actions taken by Respondent by the failure to hire the employees listed in the complaint were clearly motivated by the employees' engagement in protected union activities. I further find that the Respondent has failed to rebut the prima facie case and

has failed to establish that it would not have hired these employees in the absence of their engagement in protected activities. I base this finding on the overall record which clearly establishes that the Respondent hired around the Union applicants although they were experienced electricians and the shifting reasons put forward by Respondent's superintendent, Cain which serve to discredit his testimony. *Wright Line*, 251 NLRB 1093 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 485 U.S. 989 (1982). See also *Downtown Toyota*, 276 NLRB 999, 1014 (1985).

With respect to the failure to hire Yelverton it is undisputed that Respondent failed to hire Yelverton because he is a paid union organizer and an assistant business agent of the Union. The failure to hire Yelverton constituted a clear violation of Section 8(a)(1) and (3) of the Act under existing Board law. *Sunland Construction Co.*, 309 NLRB 1224, 1230 (1992); *H. B. Zachry Co.,* 289 NLRB 838 (1988), enf. denied 886 F.2d 70 (4th Cir. 1991). It is recognized that there is disagreement among the Circuit Courts of Appeal on this issue. in *Town & Country Electric*, 34 F.3d 625, (8th Cir. 1994), denying enf. to 309 NLRB 1250 (1992), petition for cert. granted Docket No. 94–947 (1994), the Supreme Court granted certiorari following the decision of the Eight Circuit Court of Appeals that a paid union organizer was not a bonafide employee. See *Willmar Electric Service v. NLRB,* 968 F.2d 1327, 1329–1331 (D.C. Cir. 1992); *NLRB v. Henlopen Mfg. Co*., 599 F.2d 26, 20 (2d Cir. 1979); and *Escada (UAS), Inc. v. NLRB*, 970 F.2d 898 (3d Cir. 1992), wherein the District of Columbia and Second and Third Circuits have agreed with the Board's position and *H. B. Zachary*, supra; *Ultrasystems Western Constructors, Inc. v. NLRB*, 18 F.3d 251, 255 (4th Cir. 1994); *NLRB v. Elias Bros. Big Boy, Inc.,* 327 F.2d 421, 427 (6th Cir. 1964), and *Town & Country*, supra, wherein the Fourth, Sixth, and Eight Circuits have held to the contrary. Similarly, applying *Wright Line*, supra, and *Downtown Toyota*, supra, I find Respondent has failed to rebutt the prima facie case of a violation of Section 8(a)(1) and (3) by its failure to hire Yelverton.

With respect to the layoff of Nolte's crew on the same day that Dearing, Holloway, and Bolin distributed handbills and all three of them appeared at a safety meeting wearing union insignia, I find the General Counsel has also established a prima facie case of violations of Section 8(a)(1) and (3) of the Act. I do so on the basis of the knowledge of the Respondent that Dearing, Holloway, and Bolin were union supporters following their open display of their union sympathies at the safety meeting which was attended by Respondent's supervisors, coupled with Respondent's undisputed knowledge that handbills had been distributed that morning, the animus of Respondent toward unions, and the timing and suddenness of the layoff of the crew of Nolte which I find was contrived to lay off Dearing, Holloway, and Bolin following their open union support and the handbilling of that day. I also credit the testimony of Bolin, Holloway, and Dearing that there was a substantial amount of work remaining to be done in the areas they were working at the time of the layoff and that they had been told by Respondent's management that there was a substantial amount of work to be done. I do not credit Cain's unsupported testimony that the crew was eliminated at the direction of the Vicksburg Chemical Company as a result of budget constraints and because of its desire to utilize their own forces in order to familiarize them with the equipment. It would have been a simple matter for Respondent to have supported this testimony by calling a representative of Vicksburg Chemical Co. as a witness or by supporting documentary evidence. Here Respondent did neither and Cain's testimony standing alone is insufficient as I did not find him credible with respect to his shifting and implausible explanations for his failure to hire the alleged discriminatees. Although I note that Holloway wore a union button several days or a week or two prior to the date of the elimination of the crew and openly discussed his support of the Union with his supervisor, it is apparent that Respondent tolerated this as an isolated employee's viewpoint but reacted swiftly when confronted by the handbilling and the subsequent wearing of union insignia at the safety meeting by Dearing, Holloway, and Bolin, to eliminate this crew in order to stem what then appeared to be a wider union campaign among its employees. Although Dearing and another employee on the crew may have previously informed Respondent of their desire to leave the job, this did not carry the Respondent's burden of proof in showing that the entire crew would have been eliminated in the absence of the protected activities engaged in by the employees and Respondent's knowledge of them and its demonstrated anti-union animus. *Wright Line*, supra, *Downtown Toyota*, supra.

CONCLUSIONS OF LAW

1. The Respondent, H. B. Zachry Company, Inc., is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by the statement made to employee Dearing by Cain that the Respondent was not taking applications because of the Union's members' activities in the filing of applications for employment on that date and by Cain's statement to employee Wallace that he was not hiring electricians because of the filing of applications for employment by the union supporters and by the statements made to Dearing, by Foreman Haigler that the Union had better not try to come in there and that Respondent had ways of getting around it.

4. Respondent violated Section 8(a)(1) and (3) of the Act by failing and refusing to hire union supporters Mike Mapp, James Hill, William Reynolds, Thomas Butler, and Gary Greer because of their engagement in protected concerted activities under the Act in asserting their support of the Union and their interest in organizing Respondent's employees.

5. Respondent violated Section 8(a)(1) and (3) of the Act by its elimination of Foreman Nolte's crew and the termination of employees Robert Bolin and Joe Holloway and other members of the crew who were involuntarily laid off because of Bolin's and Holloway's and Dearing's engagement in concerted activities in support of the Union.

6. Respondent violated Section 8(a)(1) and (3) of the Act by its failure and refusal to hire Sammy Yelverton as an electrician because of his status as a paid union organizer and assistant business agent of the Union.

7. The above unfair labor practices in connection with the business engaged in by Respondent have the effect of burdening commerce within the meaning of Section 2(6) and (7) of the Act.[2]

REMEDY

Having found that Respondent has violated Section 8(a)(1) and (3) of the Act, it shall be ordered to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully refused to hire applicants Mike Mapp, James Hill, William Reynolds, Thomas Butler, Gary Greer, and Sammy Yelverton and unlawfuly laid off Robert Bolin and Joe Holloway and other members of Nolte's crew, it shall be ordered to hire them or to offer them reinstatement to the same or substantially equivalent positions at other projects as close as possible to Jackson, Mississippi. In addition Respondent shall be ordered to make them whole for any loss of earnings and other benefits they may have suffered as a result of the Respondent's unlawful discrimination against them from the date they would have been hired but for the unlawful discrimination, the date to be determined at the compliance stage of this proceeding, or from the date of their layoff until Respondent makes them a valid offer of reinstatement. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), and shall be reduced by net interim earnings, with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In accordance with *Foley Material Handling Co.,* 317 NLRB 424 (1995), this portion of the remedy will be subject to resolution at the compliance proceeding of the issues outlined in *Dean General Contractors*, 285 NLRB 573 (1987), and consistent with that decision the Respondent shall have the opportunity in compliance to show that under its customary procedures the discriminatees would not have been transferred to another project after the completion of the Vicksburg project. Respondent shall also be ordered to expunge its records of any reference to the unlawful refusal to hire the discriminitees and the unlawful layoff of its employees and inform them that the unlawful conduct will not be used against them in any manner in the future. See *Sterling Sugars, Inc*., 261 NLRB 472 (1982). Respondent shall also be ordered to preserve and make available to the Board or its agents, on request, payroll and other records to facilitate the computation of backpay and rembursement due. As the Respondent has completed the Vicksburg project, it shall be ordered, in addition to posting an appropriate notice at its present office and principle places of business in Houston and San Antonio, Texas, to mail copies of the notice to all current and former employees employed on the project in 1994.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, H. B. Zachry Company, Inc., San Antonio, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening applicants for employment and employees with a refusal to take applications, a cessation in the hiring process and a refusal to consider applications of applicants and employees and with unspecified reprisals because of their support of the Union or their engagement in protected concerted activities.

(b) Refusing to hire applicants for employment because of their support of the Union or engagement in union activities or because of their status as a paid union organizer or assistant business manager of the Union.

(c) Terminating its crew and employees because of the support of members of the crew for the Union and their engagement in protected concerted activities on behalf of the Union.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative actions necessary to effectuate the policies of the Act.

(a) Rescind the unlawful layoffs of its employees Robert Bolin and Joe Holloway and others on Nolte's crew who were unlawfully laid off and make them whole for any losses they suffered by reason of the discrimination against them and offer them full and immediate reinstatement to their former jobs or, it those jobs no longer exist, to substantially equivalent positions, as set forth in the remedy section of the decision.

(b) Make whole Mike Mapp, James Hill, William Reynolds, Thomas Butler, Gary Greer, and Sammy Yelverton for any losses they suffered by reason of the discrimination against them and offer to hire them to the jobs for which they applied or to substantially equivalent positions, as set forth in the remedy section of the decision.

(c) Remove from its records all reference to the unlawful actions taken against the applicants and employees and advise them in writing that this has been done, and that such unlawful acts shall not be used against them in any manner in the future.

(d) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its facility, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable

[2] The General Counsel's and Respondent's posthearing exhibits and corrected exhibits are received.

[3] If no exceptions are filed as provided by Sec. 102.48 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 26, in writing, within 20 days from the date of this Order what steps the Respondent has taken to comply.

Susan B. Greenberg, Esq., for the General Counsel.
Mark L. Keenan, Esq. (Ogletree, Deakins, Nash, Smoak & Stewart), of Atlanta, Georgia, for the Respondent.
Wayne A. Divine, Assistant Business Manager, of Jackson, Mississippi, for the Charging Party.

SUPPLEMENTAL DECISION ON REMAND

LAWRENCE W. CULLEN, Administrative Law Judge. I issued my initial decision in this case on November 14, 1995, and found in pertinent part that Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act by failing to hire union supporters Mapp, Hill, Reynolds, Butler, and Greer and paid union organizer Yelverton and by laying off employees Holloway, Bolin, and other members of their crew. I found with respect to each of these allegations that Respondent had failed to rebut the General Counsel's case.

On August 16, 1996, the Board entered its order remanding the case to me to prepare and serve on the parties a supplemental decision setting forth specific credibility resolutions, findings of fact and new conclusions of law and recommendations in light of the additional findings of fact, including a recommended Order, with respect to the above matters. I was also ordered to clarify which exhibits are part of the record in this case. Copies of the supplemental decision are to be served on all parties. Thereafter the provisions of Section 102.46 of the Board's Rules and Regulations shall apply. Pursuant to my direction the parties filed briefs on remand to me on December 31, 1996.

On the entire record in this proceeding, including my observations of the witnesses who testified at the hearing, and after due consideration of the exhibits including late filed exhibits received in this case and after due consideration of the briefs on remand, I make the following supplemental findings of fact and conclusions of law, and set forth the recommended remedy, Order, and notice

FINDINGS OF FACT[1]

The Board in its Order directed me to:

> (1) "[M]ake factual findings and credibility resolutions respecting the Respondent's contention that it phoned and where possible, left messages for qualified Union applicants, but was unable to offer them employment because they were not at home to receive the calls."
>
> (2) "[A]ddress documentary record evidence, including phone records and notations on Employment applications indicating that the Respondent called certain Union applicants."
>
> (3) "[A]ddress the General Counsel's contention that the Respondent's phone calls were a 'sham.'"
>
> (4) "[M]ake factual findings and credibility resolutions regarding."
>
> (a) "the Respondent's stated hiring criteria."
>
> (b) "whether the discriminatees met these criteria."
>
> (c) "its application of those criteria to the alleged discriminates."
>
> (d) "its specific reasons for not hiring or trying to contact individual Union applicants."
>
> (5) "[E]ngage in a comparative analysis of the employment qualifications of the alleged discriminatees vis-a-vis those of the applicants whom the Respondent hired instead during the relevant period."
>
> (6) "[A]ddress the Respondent's testimony concerning practice of hiring helpers, presented to rebut the General Counsel's contention that, at a minimum, the Respondent should have hired the Union applicants as helpers."
>
> (7) "[S]et forth the shifting reasons on which he relied" in discrediting the testimony of Respondent's electrical supervisor Cain.
>
> (8) With respect to the layoff of Nolte's electrical crew, decide the issue "who made the decision to lay the employees off and what the motivation for the layoff was."
>
> (9) "[C]larify which exhibits are part of the record, including whether post hearing exhibits submitted by both the General Counsel and Respondent are admitted into evidence."[2]

Items 1, 2, 3 4, 5, 6, and 7—The Telephone Calls—The Stated Hiring Criteria—Whether the discriminatees met these criteria-Respondent's application of the stated criteria to the alleged discriminatees—Specific reasons for not hiring the discriminatees or trying to contact individual union applicants —The practice of hiring helpers and General Counsel's contention that the Union applicants should have been hired as helpers, The shifting reasons on which I relied in my initial decision in discrediting Cain's testimony

As contended by the General Counsel, I find that 1-minute telephone calls were part of Respondent's overall determination not to hire union members or organizers. In making this determination, I have considered the initial reaction of Cain to the applications of the union organizers and members at the time of their application, I have credited Dearing that he was initially told by Cain that he was not taking any more applications because the Union had "struck him" and that he had to take the applications "in order" and have concluded that this comment was a reference to the filing of applications by the overt union organizers and members on August 17 and 18. Thus I conclude that Cain reacted to the filing of applications by ceasing to take applications and closely scrutinizing applicants thereafter. Cain admitted consulting with Vicksburg Project Manager Andy Power who had consulted with Personnel Manager Chuck Mitchell and was advised that Cain did not have to hire Yelverton because of his position of paid assistant business manager

[1] My original decision should be corrected by changing applicant name George "Meyer" to George "Myrick" throughout and by changing "Mapp" to "Reynolds" in the paragraph immediately preceding the "Analysis."

[2] The exhibits which are part of the record have been set out in my Order of October 24, 1997.

which information was then passed on to Cain. I find this undisputed admission that Power consulted with Respondent's personnel representatives concerning Yelverton, supports an inference that he sought and received advice as to how to handle this entire episode concerning the union salts.

The evidence establishes that Cain utilized various methods to exclude the salts from consideration. In the case of Butler he latched onto Butler's response to the out-of-town question that he would only travel 50 miles away from his home and contended that he concluded that Butler was applying to another jobsite near Butler's home and thus eliminated him from consideration. I do not credit this alleged reason for refusing to consider Butler but find that this was a subterfuge to eliminate Butler from consideration. Since Butler applied in person, it is obvious that he knew where the jobsite was located and was applying there and that if he had intended to apply to another jobsite, he would have done so as Butler made no mention of the other jobsite on his application. In any event, if this was of concern to Cain, he could have contacted Butler and clarified this concern. However, instead he eliminated Butler from consideration based on his assertion that he believed that Butler was not applying at this jobsite.

With respect to Reynolds, Respondent initially contended at the hearing that he was unable to contact him by a single telephone call. Reynolds testified that he had call forwarding to his sister's home where she cared for terminally ill patients and that no calls were received on his answering machine and no calls were forwarded to his sister's home where there was someone 24 hours a day. Only when the General Counsel called Reynolds' sister to the stand, did the Respondent's Counsel offer to stipulate that Cain had not called Reynolds.

At the hearing the Respondent in questioning Reynolds and Cain developed that Reynold's application listed only three employers although space was allotted for five employers on the application and listed the three employers' home offices which were in different States than the States in which the projects had been. As the General Counsel contends, Reynolds did list recent experience and it is obvious that since the projects were completed, that the logical place to contact the contractors would be their home offices rather than the site of a completed project which would be unlikely to have any of the contractor's representatives remaining at that site. Additionally Cain was asked whether he knew of the contractors listed by Reynolds and testified he did not in an apparent attempt to justify either not relying on this information or not contacting and inquiring about Reynold's work record with these employers. However, Cain did not testify that he knew the various other employers listed by applicants he hired or that he attempted to contact any prior employers of any applicants. Reynolds' application listed 14 months of journeyman experience.

On cross-examination Cain testified he attempted to telephone Mapp, Greer, and Hill on one occasion and that unless he received a live answer at the other end of the telephone line, he probably did not pursue it. Cain testified he attempted to telephone Randell Perrigin and marked "no answer" on his application on 9/21/94 to offer him a job for $13.50 per hour. Perrigin's application showed he was currently working for Horvis Electric for $16.82 per hour. Cain did not return phone calls from applicants "not 100 percent of the time, No" but did so "Probably 1 or 2 percent."

He testified he could not reach union salt Billy Brady who had applied on August 17 and had written "IBEW Union organizer" on his application. With Billy Brady's application he did not attempt to seek directory assistance after he could not reach his telephone number and marked bad telephone number on Brady's application.

With respect to the applications of Hill, Mapp, and Greer, Cain testified that he attempted to contact them on a single occasion but was unable to do so and then moved on to other applications in accordance with his practice of only telephoning applicants once and then moving on to other applications. However, as the General Counsel contends, Cain did telephone other applicants on more than one occasion such as Bolin and apparently reached Dearing by other means than a telephone after having missed him on the first call and asked Bolin to contact Dearing as he intended to hire him. Thus there is evidence of disparate treatment in the hiring process as even accepting Cain's testimony that he did attempt to contact Hill, Mapp, and Greer on a single occasion, he chose to bypass them from further consideration but made additional contacts to other applicants who he did not reach on the first call. I conclude rather, in accordance with the General Counsel's position that Cain did engage in sham telephone calls to the union salts by making contact and hanging up the telephone in order to show a telephone call had been made to their telephone number. As the General Counsel contends, a 1-minute increment is the smallest increment on the telephone records and any connection will appear as at least 1 minute. Hill, Mapp, and Greer each testified that they had not received calls and Hill and Greer had no messages on their recording devices in contrast to Cain's testimony, and notation on their applications that there were no answers to his calls. I credit these employees in this regard. Moreover, Hill testified that on two occasions he telephoned Respondent's office and left his telephone number with the person who answered the telephone and that his call was not returned. Cain addressed this by testifying that he rarely answers such telephone inquiries. Thus Cain had an answer to every inquiry, but I find these answers were contrived in order to justify his failure to consider the union salts for hire.

With respect to Cain's stated hiring criteria, he testified that he gave first preference to former employees of Zachry at other jobsites who had been laid off and had received good recommendations which are available to him from Respondent's home office, He next hires employees who are recommended by his supervisors and by management at other jobsites after the employees are laid off. He will not hire an employee who is currently working at another Zachry jobsite and quits to work on his jobsite. He also takes recommendations from current employees on his jobsite. Finally he considers applicants who walk into his office adjacent to the jobsite by going through the Respondent's application forms they have filled out He looks for stability of employment and commercial experience and based on the information on the applications, decides whether to call the applicants. When he contacts them by telephone, he discusses the job and the pay and tells them to come to the jobsite for a drug test and generally talks to them briefly when they

present themselves at the jobsite. The drug test results are usually received two to three days later after which the applicants who pass the test are told to come in to work. I find this to be a facially neutral hiring process and do not find any violation with respect to this hiring process as stated.

Respondent does not contend that the three applicants whom Cain testified he called but did not reach were lacking in experience as based on his testimony he considered them acceptable and was calling them to hire them. Nor did Cain contend that Yelverton, Butler, nor Reynolds was unacceptable but did not consider them for the other reasons set out above in this decision. I conclude that Respondent did not consider any of the overt salts for hire. The Respondent points to the application of Donald Smith who Yelverton admitted was contacted. Smith did not write that he was a union organizer or IBEW member on his application but did set out that he had apprenticed under the IBEW program. Moreover his application listed recent employment with nonunion employers at nonunion rates. I find that Respondent did not exclude Smith from consideration because of his union apprenticeship as the listing of nonunion employers by Smith on his application indicated that he was not working under a union contract prior to his application with Respondent. Respondent also contends it attempted to contact George Myrick. As indicated by Cain's unrebutted testimony which I credit Myrick indicated on his application that he was an IBEW organizer. I conclude that Cain did call Myrick and left a message with his wife.

With respect to the Board's direction that I engage in a comparative analysis of the qualifications of the union salts to those employees who were hired by Respondent, I find that the evidence shows that the union salts were experienced employees in the electrical field having apprenticed through the IBEW program with many years of experience although their applications did not generally specify all of the information requested whereas the employees hired as electricians were generally less experienced. The salts' applications nonetheless indicated substantial experience on their face and Cain admittedly did not disqualify them on the basis of a lack of information on their applications except in the case of Yelverton and Reynolds. Yelverton's application listed a completed IBEW apprenticeship program. In a category on the application form designated as "What type of equipment can you operate or repair?" he listed, "all types electrical tools, wnich trucks, bucket trucks, etc." Yelverton, as well as virtually all of the applicants but two responded "yes' to the question whether he had his own tools and "yes" to the question whether he would accept employment out of town. He listed his first choice as a journeyman electrician and left blank the category "second choice." He also responded that he had a Mississippi license as an electrician in response to this question on the application form. There are five areas on the back of the application forms for a listing of the last five employers, their addresses, their supervisors and designating start and finish dates, rate of pay and reason for leaving. In the first area Yelverton listed the position of assistant business manager and IBEW Local Union 480 as his employer from April 1992 to the present. In the second area he listed the position of business manager with IBEW Local Union 1329 as his employer from November 1989 to April 1992. In the third area he listed Capital Electric Co. with no address except Leavenworth, Kansas, and did not list his supervisor and designated his job as journeyman electrician from September to November 1989 when he left to take the business manager position. In the fourth area he listed NECA (National Electrical Contractor Association) contractors all over the United States from June to present but did not list any employer's names, addresses or the names of any supervisors or the reason for leaving but claimed "*28 years experience* in all kinds of electrical const, cable splice + certified welder." (Emphasis added.) His total electrical experience listed at Capital Electric Co. was 3 months.

The application of Greer contains the notation "no answer 9–21–94" and Hill's application contains the notation of "called 9–21–94 no answer" which Cain contended he had made after attempting to contact them for employment. Hill cites training as an inside journeyman and lists experience with small equipment and that he would accept employment out of town. Hill's application lists two electrical contractors where he cites work as a journeyman electrician with one contractor from March to July 1994 and with another contractor from July 1991 to November 1993. He also lists IBEW Local 48 in the third area set aside for employers. The fourth and fifth areas set aside for past employers are blank.

Davis Gary Greer's application on which the notation "No Answer 9/21/94" appears, referencing Cain's contention that he called Greer on that date but received no answer, shows that Greer listed journeyman electrician as his first choice of employment but left the category for his second choice blank. Greer's application claims fork lift, bucket truck, and trencher experience and indicates that he will accept out-of-town work and claims an electrician's card in Mississippi. He lists four prior employers in electrical construction for approximately 33 to 40 months of employment with conduit and cable pulling and wire termination experience.

The application of Johnny Wier dated August 10, 1994, lists electrician as the first choice and foreman as the second choice of position sought and lists equipment operating experience of a 10-ton crane, a backhoe, a forklift, and a welder. It states he would accept employment out of town. It lists employment with five different electrical businesses: one in maintenance and four in construction for a total of 35 months of maintenance work and 71 months of construction work.

The application of Christopher Wallace lists journeyman electrician as the position sought and a willingness to accept out of town employment. It lists a 1 year completed ABC Electrical Course I as educational background and five different employers as a journeyman electrician for a total of 43 months experience as a journeyman electrician.

The application of Douglas Knight, Jr. dated August 18, 1994, lists electrical construction as the position sought and that he is unwilling to travel out of town from Mississippi. It lists an electrical license in Mississippi. Only three electrical employers are listed for a total of 14 months of electrical experience. All three prior positions are listed as wireman. The employers listed were in Florida, Georgia, and Louisiana.

The application of Thurman Ferguson, Jr. lists electrician I as the position sought. It lists a 1-year ABC Electrical Corre-

spondence course and cites the ability to operate "all electrical equipment" and a willingness to travel out of town. It lists employment in electrical construction dating back to June 1991 for a total of 28 months.

The application of Paula Haigler lists no experience as an electrician. She is the wife of Respondent's foreman Randy Haigler and was hired as a helper under the supervision of her husband to work after the completion of her clerical duties as a part-time employee of Respondent in the morning. Cain conceded at the hearing that supervision of an employee by her spouse violates company policy. Haigler did electrical terminations under the supervision of her husband according to Cain at the hearing.

The application of Robert Bolin seeks a position as an electrician and lists "BAT Electrical Training" with the notation "Grad" and attendance from 1989 to the present (August 18, 1994), date of the application for a total of 60 months' experience and lists five employers.

The application of Tommy Dearing is dated August 18, 1994 and seeks an electrical position and lists five employers dating back from l992 to 1988 as an apprentice. The combined work experience shown on the application is 22 months as an electrician and 36 months as an apprentice.

The application of Mark McAllister Ashe is dated August 19, 1994, and seeks as his first choice employment as an inside wireman and as his second choice an outside line apprentice. It lists two electrical contractors as former employers dating back from 1986 to April 1994 over a 75 month period. It lists a journeyman electrician license in Mississippi.

The application of Samuel Lungren Jr. lists an electrician position as his first choice and a top helper position as his second choice. It lists two places of employment as an electrician for a total of 33 months of experience with two employers.

The application of Peter Williford dated August 17, 1994, lists Electrician as his first choice of position sought and that he would accept out of town employment. It lists 20 months experience as an electrician with two different employers.

Analysis

I am convinced that the Respondent refused to consider the overt union applicants for employment. I conclude the General Counsel has demonstrated that the Respondent was determined to avoid hiring the overt union applicants. I find the brief calls generated in the amounts of one minute were as contended by the General Counsel, made to establish a record of the call while not actually contacting the applicant. I conclude on the basis of the record that Respondent has failed to establish that it would not have hired them on the basis of their failure and/or refusal to adequately answer the inquiries listed on the applications. I reach this conclusion solely on the basis of the information supplied on the applications rather than testimony elicited by the General Counsel at the hearing. Almost without exception the applicants selected for employment filled the applications out completely and demonstrated substantial recent employment and a stable record of employment in recent years. They also listed supervisors' names and reasons for leaving. Smith, who was contacted by Respondent listed an IBEW apprenticeship program under the category for additional education. Smith's application was fully completed setting out five prior employers, listing the names of supervisors, and the type of work performed demonstrating a relatively stable work history in the highly mobile construction industry. Smith's past employment was with nonunion contractors and he did not write IBEW or union organizer on the top of his application as did the overt salts. Conversely, the applications of the overt salts do not indicate with much specificity for whom they worked, what type of work they performed and who supervised them. While I do not find that the failure to fill out every detail of their prior employment was fatal to their employment prospects, the lack of substantial information on the salt's applications provides the employer with only meager information on which to make the employment decision. I find it unlikely that someone truly seeking work would not fully complete their applications and list their supervisor's names and list the type of electrical work they performed. This does call into question whether the salts were truly seeking work but does not establish by the preponderance of the evidence that they were not. However I find no support for Respondent's position that it would not have hired them as Respondent disqualified them for other reasons in the cases of Butler, Yelverton, and Reynolds and Respondent contends that it attempted to contact the other union salts for hire but was unable to reach them. Accordingly since Cain contended that he had attempted to contact Greer, Mapp, and Hill on a single occasion but was unable to do so, I find this assertion contradicts any contention of Respondent that it would not have hired them because of any deficiencies in their applications. I thus find that Respondent has not shown that their applications are deficient in any manner. It disqualified Yelverton because he is a union assistant business manager and full-time organizer on which basis Respondent contends that he was not an employee under the Act This has been answered by the United States Supreme Court in *NLRB v. Town & Country Electric, Inc*., 1145 S.Ct. 450 (1995), which held that paid union officials are employees under the Act and cannot be excluded from the protection of the Act because of their union positions. Since Yelverton's application also claimed 28 years of experience, I do not conclude that Respondent has demonstrated it would not have hired him in the absence of the unlawful motivation asserted by Respondent's admitted exclusion of Yelverton from consideration because of his position as a paid union representative. Further, Cain did not testify that he contacted previous employers listed by the applicants concerning Reynolds' application. However, Reynolds' application shows he had at least as much experience as Knight who was hired. I also find pretextual Cain's assertion that he disqualified Butler from consideration because of his notation of 50 miles in answer to the question on the application whether he was willing to work out of town. I also find that any alleged deficiencies in the applications of the other union salts Greer, Mapp, and Hill do not support a conclusion that Respondent would not have hired them since Cain testified at the hearing that he did telephone them for hire but was unable to reach them. Although I have found Respondent's stated hiring criteria as testified to by Cain to be facially neutral. I find no support for the conclusion that it was used to exclude the union salts from hire. Rather I find that the union salts were excluded

from both consideration and hire solely because of their union affiliation and that Respondent has failed to establish by the preponderance of the evidence that the union salts would not have been considered and hired even in the absence of Respondent's unlawful discriminatory motives in excluding them from consideration and hire. I thus reaffirm my conclusions in my original decision in this case that Respondent violated Section 8(a)(1) and (3) of the Act by its refusal to consider and hire the discriminatees because of their union affiliation and activities.

With respect to the Board's direction that I address the Respondent's testimony concerning its practice of hiring helpers, presented to rebut the General Counsel's contention that, at a minimum, the Respondent should have hired the union applicants as helpers, I find that none of the union applicants put down a second choice in the space designated for a second choice on their applications and thus did not apply for helper positions. Moreover this subject was not raised at the hearing in the context of hiring the union applicants as helpers and I accordingly decline to speculate whether the union applicants would have taken helper positions if they had been offered. Their failure to designate a second choice on their applications suggests they would not have taken helper positions.

However, I do credit the testimony of Bolin, Holloway, and Dearing that helpers were used to perform tasks normally performed by electricians and find this lends further support to the General Counsel's position that the Respondent was utilizing helpers to perform the work of electricians such as pulling wire and making terminations and using electrical tools in performing these tasks in an effort to avoid hiring additional electricians at a time when the union applicants' applications were on file. While I credit Cain's testimony that helpers were previously used between crafts, I find that the testimony of Bolin, Dearing, and Holloway supports a finding that helpers were being utilized to perform journeyman electrical work using electrical tools in order to avoid hiring the union applicants.

As I have found in my original decision I reaffirm my findings that the General Counsel established a prima facie case that antiunion animus was a substantial motivating factor in Respondent's failure and refusal to hire the discriminatees and that Respondent has failed to rebut this case and has failed to establish that it would not have hired the discriminatees even in the absence of the unlawful motive *Wright Line*, supra, *Manno Electric*, supra. I have relied on the credited testimony of Dearing that Cain stopped the hiring process and told Dearing that he was no longer taking applications as he had to take them in order because he had been "struck" by the Union and that only after Dearing convinced Cain that he was not a union adherent, was he allowed to file an application. I also rely on the credited testimony of Dearing that Foreman Haigler had stated that the Union adherents had better not try to come on the jobsite as Respondent had ways of taking care of them if they did apply. These statements by Respondents' supervisors and agents certainly provide substantial evidence of Respondents' animus and its determination to refuse to hire any union adherents. I have also discerned a pattern throughout Cain's testimony of seizing on any pretext to justify not hiring the union salts. Clearly he received advice by Respondent's management as to the procedure to be followed in his response to the appearance of the salts at the jobsite as in the case of assistant business manager Yelverton who was disqualified as a full-time union official. His disqualification of Butler from consideration on the basis of his notation of "50 miles" in answer to the application query as to whether he was willing to work out of town, his disqualification of Reynolds on the ground that he listed out-of-town employers with whom Cain testified he was unfamiliar, following Respondent's earlier position at the hearing that Cain had tried to reach Reynolds was also pretextual. I further found in agreement with the General Counsel that the 1-minute calls to Hill, Mapp, and Greer were a sham calculated to give the appearance of an effort to reach them by establishing a brief telephonic contact in conjunction with Respondent's failure to make any other efforts to contact them ostensibly on the basis of Cain's alleged practice of only calling an applicant on one occasion whereas the records and testimony show that he called Bolin twice, and contacted Dearing by other means after failing initially to contact him by telephone. Assuming arguendo that Cain did attempt to telephone Hill, Mapp, and Greer on one occasion, I find his failure to contact them further is evidence of disparate treatment.

The layoff of Nolte's electrical crew

In my initial decision I found that Respondent had laid off Nolte's entire crew the same day that crew members Dearing, Holloway, and Bolin had distributed handbills and all three of them had appeared at a safety meeting wearing union insignia. It is undisputed that the meeting was also attended by Respondent's supervisors. It is also undisputed that union handbills had been distributed that morning prior to the start of the shift. Cain admitted being made aware of this by a clerk that morning. I credit the unrebutted testimony of Holloway, Bolin, and Dearing that they wore union insignia to the morning safety meeting attended by Respondent's supervisors and I find the supervisors' knowledge of this is properly imputed to Cain. Cain testified that he met with the supervisors following his meeting with Vicksburg Chemical Company representatives and that he made the decision to terminate Nolte's crew. I conclude that Cain had knowledge of the open display of union support by Dearing, Holloway, and Bolin, all members of Nolte's crew and that he was aware of the handbills which were brought to the trailer by one of Respondent's clerks. I find that Cain made the decision to lay off Nolte's crew that day. Cain acknowledged that he did so but contended that the layoff was necessitated at the direction of the Vicksburg Chemical Company. As set out supra in this decision I have discredited Cain's testimony as I found him to advance shifting reasons for not hiring the salts by relying on pretextual reasons for not hiring them, i.e., refusal to hire Butler because of his notation of a 50-mile limit after he applied at Respondent's jobsite, refusal to call Reynolds on the basis of Reynolds' out-of-state experience wherein other applicants with out-of-town experience were hired, the brief single contacts (1 minute) telephone calls to Mapp, Hill, and Greer. I have considered the animus of Respondent toward the Union and its supporters as found in the 8(a)(1) violations, the knowledge of Cain of the display of the union insignia by the three members of Nolte's crew on behalf of the Union on the same day of the handbilling on behalf of

the Union by these three members, the admission by Cain that he made the decision to lay off Nolte's crew on the same day. I find the knowledge, animus, and the timing of the layoff closely following the union handbilling on the same day establish a prima facie case that the layoff was discriminatorily motivated. As I have found Cain's testimony regarding his reasons for not hiring the union applicants was not credible, I find unconvincing his unsupported testimony that the layoff was the result of Vickburg's Chemical Company's decision to reduce Respondent's work force on the job by utilizing its own employees to do the work. I also find as contended by the General Counsel that the Respondent's failure to support the testimony of Cain (as it had control of any documents and knowledge of the representatives of Vicksburg who he asserted had ordered him to reduce the employee complement) warrants an inference that they would not have supported his position. I thus find that Cain's unsupported testimony is insufficient to rebut the prima facie case established by the General Counsel that Respondent's animus toward the Union and its supporters was a substantial motivating factor in Respondent's decision to lay off Nolte's crew. *Wright Line*, supra, *Downtown Toyota*, supra.

CONCLUSIONS OF LAW

1. The Respondent, H. B. Zachry Company, Inc., is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by the statement made to employee Dearing by Cain that the Respondent was not taking applications because of the union members' activities in the filing of applications for employment on that date and by Cain's statement to employee Wallace that he was not hiring electricians because of the filing of applications for employment by the union supporters and by the statements made to Dearing by Foreman Haigler that the Union had better not try to come in there and that Respondent had ways of getting around it.

4. Respondent violated Section 8(a)(1) and (3) of the Act by failing and refusing to hire union supporters Mike Mapp, James Hill, William Reynolds, Thomas Butler, and Gary Greer because of their engagement in protected concerted activities under the Act.

5. Respondent violated Section 8(a)(1) and (3) of the Act by its failure and refusal to hire Sammy Yelverton as an electrician because of his status as a paid union organizer and assistant business agent of the Union.

6. Respondent violated Section 8(a)(1) and (3) of the Act by its elimination of Foreman Nolte's crew and the termination of employees Robert Bolin and Joe Holloway and other members of the crew who were involuntarily laid off because of Bolin's and Holloway's and Dearing's engagement in concerted activities in support of the Union.

7. The above unfair labor practices in connection with the business engaged in by Respondent have the effect of burdening commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

I recommend that the unlawfully discharged employees in this case and the applicants unlawfully denied hire in this case shall be offered reinstatement or employment to the same or substantially equivalent positions in which the Respondent previously employed them or for which they applied, without prejudice to any seniority or other rights or privileges previously enjoyed or to which they would have been entitled in the absence of the hiring discrimination. I also recommend that the Respondent make them whole for any loss of earnings and other benefits they may have suffered as a result of the discrimination against them, from the date of the discharge in the case of the discharged employees, or in the case of the job applicants from the date they applied for employment to the date Respondent makes them a valid offer of reinstatement or employment. These amounts shall be computed in the manner prescribed in *F. W. Woolworth, Co*., 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Order shall be subject to resolution at the compliance proceeding of the issues outlined in *Dean General Contractors*, 285 NLRB 573 (1987). Accordingly, the Respondent will have the opportunity in compliance to show that the discharged employees' or the applicants would not have been transferred to other jobsites after the completion of the Vicksburg job and that therefore no backpay and reinstatement obligation exists beyond the completion of the Vicksburg job. See also *Starcon, Inc*., 323 NLRB 977 fn. 2 (1997).

On the findings of facts, conclusions of law, and the entire record, I issue the following[3]

ORDER

The Respondent, H. B. Zachry Company, Inc., San Antonio, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening applicants for employment and employees with a refusal to take applications, a cessation in the hiring process and a refusal to consider applications of applicants for employment and with unspecified reprisals because of their support for the Union or their engagement in protected concerted activities.

(b) Refusing to hire applicants for employment because of their support of the Union or engagement in union activities or because of their status as a paid union organizer or assistant business manager of the Union.

(c) Discharging its crew and employees because of their support for the Union and their engagement in protected concerted activities on behalf of the Union.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative actions necessary to effectuate the policies of the Act.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Within 14 days of this Order, offer to employees Robert Bolin and Joe Holloway and other members of Nolte's crew unlawfully laid off full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and make whole these employees, with interest, for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(b) Within 14 days of this Order, offer to the employees Mike Mapp, James Hill, William Reynolds, Thomas Butler, Gary Greer, and Sammy Yelverton employment in jobs for which they applied for, or if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges to which they would have been entitled if they had not been discriminated against, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusals to hire or unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the refusals to hire or discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in San Antonio, Texas, copies of the attached notice marked "Appendix,"[4] which is hereby substituted for the notice attached to my original decision. Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. As Respondent has closed the Vicksburg, Mississippi facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at the Vicksburg jobsite as well as the discriminatees in this case any time since August 1994.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[4] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."